AN

ESSAY

ON THE

DOCTRINE OF REMAINDERS,

AND,

AS COLLATERAL AND SUBORDINATE TOPICS,

OF

EXECUTORY LIMITATIONS.

BY

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PREFACE.

An important part of the doctrine of Remainders having been treated of in a work which may be thought to render another production superfluous, it is necessary to trouble the reader with a brief statement of the peculiarities of the present Essay.

First, — It has traced from the earliest periods of English history the gradual developement of that system of settlement, which has been always interwoven, and in some degree identified, with the learning of Remainders.

Secondly, — It exhibits a collective view of Remainders; and, as collateral and subordinate objects, of future uses, future trusts, and executory devises; endeavouring to show their various points of relation, analogy, and contrast; but more particularly when a limitation intended to operate as a Remainder, but failing as such, can enure under those doctrines.

Thirdly, — It contains a full enquiry into the abstract nature of a Remainder, without reference to its vestedness or contingency. This examination embraces many interesting topics never before brought together.

Fourthly, — It treats of Vested Remainders; a branch of the doctrine which, it is believed, no modern treatise has hitherto discussed in detail.

Fifthly, — It omits the rule in Shelley's case, with a sacrifice (it is confessed) of abstract propriety to extraneous considerations; but the author did not feel justified in going into an exhausted learning.

Sixthly, — The author has laboured to supply what others have omitted. His Essay is in general copious when the ground has been neglected, and when pre-occupied, concise.

Seventhly, — He has endeavoured to correct the errors which, he conceives, his predecessors have occasionally sanctioned. In mentioning this part of his design, he will express his anxiety that it may be ascribed to its true motive, a desire of utility; and that he may not be thought to arrogate an exemption from similar mistakes, or to undervalue those whose opinions he has presumed to controvert.

He will only observe further, that the support which is yielded him by the authorities cited in the ensuing sheets is sometimes inferential, and by consequence indirect; but he trusts that on reflection they will always appear relevant.

2. *Fig-tree Court, Temple,*
January, 1827.

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INTRODUCTION.

A BRIEF ACCOUNT OF REAL PROPERTY FROM THE EARLIEST PERIOD TO THE PRESENT, WITH REFERENCE TO ITS PROGRESSIVE CAPACITY FOR SETTLEMENT.

It has been frequently observed, that though nothing is so generally interesting as *property*, or *the right which we possess to the objects around us*, few, except those who are fond of abstract speculation, ever reflect on the means by which it was originally acquired, or the various gradations of its advance from its primitive formation to the strength and beauty of its completion. In an enlightened age there undoubtedly are enquiries more attractive and important; but, however pardonable may be the neglect of this investigation in the general reader, it is certainly incumbent on the Student of English Law, who is desirous of comprehending its principles, to inspect the ruins of antiquity, which formed the foundation, and furnished the materials of modern jurisprudence. And it will not only instruct but gratify him who is habitually acquainted with the complex machinery of a voluminous settlement, and perceives it accomplishing a variety of present objects, obeying at a remote period its original impulse, and varying its phases

with the change of persons and circumstances, to view its secret springs, and the causes of their formation.

Of the rules of property, those which relate to land are the most perfect. And their imperishable basis seems to have communicated to them a corresponding stability; for, while other departments of the common law have fallen into decay, they preserve every material character which our ancestors engraved upon them. Of all the ramifications of this system; that of *remainders*, or *interests which are limited to arise at a future period after the expiration of another estate*, has always been deemed the most difficult in theory, and most dangerous in practice: except, perhaps, those collateral doctrines which have grown up around it, supplying its defects, and flourishing in its neighbourhood. Hence an elementary essay on these may be not unacceptably preceded by a view of the progressive development of real property, from the rudeness of its infancy, to the numerous, and perhaps overwrought, refinements of its maturity. The labours of previous writers, and the nature of proëmial discussion, will, however, prevent more than a rapid survey of the epochs which mark this deduction; but the inducement which their magnitude and importance may excite, to scrutinise them minutely, is still more strongly opposed by consciousness of inability for an undertaking which would lead into an immense field of research.

Policy of the aboriginal British.

I. Of the policy of the *aboriginal British*, in respect to land, nothing is known. Conjecture, however, has not been wanting; and it has been

plausibly inferred from the laws of the Britons in Wales in the ninth century, that the *jus proprietatis of all the land in the realm* was vested in the king. (*a*) But, besides that rational curiosity would be little pleased by the policy of an insulated people, sunk in ignorance and barbarity, the Saxon invasion wrought so complete a change, that few antiquarians have pretended to discover any traces of its existence. (1)

Institutions of the Anglo-Saxons.

II. But the institutions of the *Anglo-Saxons* are well deserving of attention; for (so remarkable is the coincidence) it would scarcely breathe too much of the spirit of antiquarianism to affirm, that modern improvements are little more than renovations of those efficacious qualities with which that wise but unsophisticated people endowed every species of property. At this period we find not only grants in absolute fee simple (*b*), but partial interests carved out of the inheritance with a limitation of remainders over. (*c*) And although such limitations were usually to the church, there can be little doubt that they were often used for family purposes. For in the simplicity of the Anglo-Saxon institutions, the intention of the parties was not thwarted by any technical or arbitrary rules of construction; as is manifested by the endless di-

(1) The partible quality of lands, by the custom of gavelkind, is, however, undoubtedly of British original. 4 Bl. Com. 408.

(*a*) Turner's Hist. Anglo-Saxons. 222.

(*b*) Smith's App. p. 767. Astle's MS. charters, n. 12. 16.

(*c*) Smith's App. Bede. p. 773. 778. Heming. Chart. p. 6. 8.

versity of their grants. (2) And except the burdens which private stipulations imposed on property, the celebrated *trinoda necessitas*, which emanated from social policy, and harmonised with political liberty, was the only condition annexed to its enjoyment.

III. The English, blessed with these privileges, were enabled by any mode of assurances to shape their property at pleasure, without fearing that calamitous litigation which has since so often arisen from the ambiguities of artificial construction, when their excellent edifice was suddenly subverted by the Norman William. And the constant convulsions of the kingdom, after that unhappy event, will surprise none who have reverted to the contrast between the free laws of the Anglo-Saxons, and the dark entangled code of the foreign jurists, — a heterogeneous compound of military rudeness and scholastic subtilty, baneful to private property and public happiness, and only advantageous to a despotic monarch and his predatory followers.

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(2) An able and judicious antiquarian (Mr. Turner), in treating of this interesting subject (History of the Anglo-Saxons, 207—225.), has applied the term *tenure* to the Anglo-Saxon holding with some inaccuracy; for we frequently find *conditional*, and, sometimes, even *stipendiary* grants, but not the *tenure* of the feudists. The grants of the Anglo-Saxons usually contain a regular *habendum*, not however, as Mr. Turner expresses it, to determine *the nature of the tenure*, but, as at the present day, *to fix and ascertain the interest of the grantee* (see instances, Smith's Appendix, p. 767. Astle's MS. Charters, n. 12. 16.); and it is believed that no part of them answered to the *tenendum* of the conveyance of later times. See an instance of a *conditional* grant, Heming. Chart. p. 191.; of a *stipendiary*, 3 Gale's Script. p. 475.

Introduction of the feudal system.

From the mighty influence of the feudal system in every country in which it was received, in all of them either extinguishing the municipal law, or leaving but few and faint vestiges of its existence, we may date the doctrine of estates and tenures from its introduction into England. It is usual to refer that event to the Norman Conquest (*a*); for although a regulation nearly resembling feuds in some principal features preceded that period, and was probably adopted by the aboriginal islanders, the hardships of military holdings were naturally abolished, or rather relaxed and re-modified by the Anglo-Saxons (*b*), when they were protected by the ocean from those sudden incursions which rendered tenures on the Continent expedient, and even necessary. But at the time of the conquest the monastic clergy had made the knowledge of municipal law the means of temporal power; and, to prevent the ignorant laity from participating in its emoluments, had surrounded jurisprudence with a labyrinth of learning; and on arriving in England they supported by their zeal what they had erected by their ingenuity. (*c*) In the early ages of feudal polity every consideration bent to the advantages of military success; and in order to cherish to the utmost extent the martial spirit of the people, it was usual for those in whom the judicial or executive authority was reposed, to resume and distri-

(*a*) 2 Bl. Com. 47. Spelm. Glossary, Feudum. But. Co. Litt. 191 a. 6. s.

(*b*) Among the Saxons (says Dalrymple) a great part of the lands of England were held by a feudal tenure, yet many of them continued still to be allodial. Feuds, 14.

(*c*) Vide Malmes. lib. iv.

bute annually the lands of the feudatory. (*a*) But a positive law, which contravenes the inextinguishable propensities of human nature, will always perish when the occasion which gave it birth has passed away; and accordingly as the restlessness of migration, and the fury of military enthusiasm abated, the love of wealth and luxury resumed its dominion; and a permanent property in lands arose, gradually dilating from an estate for years to an estate descendible to the heir. (*b*)

Inflexibility of real ownership under the feudal system.

But though real ownership was thus rendered as absolute as the nature of a *dominium utile* or *beneficium* would admit, a severe observation of thefundamental principles of feudality imparted to it an inflexibility, which was equally incompatible with commercial traffic and family provision, as an annual resumption by the feudal chief. Thus the reciprocal relation of lord and tenant rendered the concurrence of them both requisite in every alienation; and the interest which the heir derived from the difficulty of defeating the succession to him, made in some cases his acquiescence likewise necessary. Whence some have supposed the feud to have been totally inalienable (*c*); and if we read the word *heir* in its strict and limited sense,

When the feudal law required the concur-

(*a*) *Arva per annos mutant.* Tacit. de Mor. Ger. c. 26.

(*b*) Lib. Feud. 1. tit. 1. Wright, 14. But Mr. Hallam, in his Account of the Origin of the Feudal System, thinks that there is no satisfactory proof that these benefices were ever resumable at pleasure; that from the beginning they were ordinarily granted for the life of the grantee; that they very early became hereditary, and as soon as they did so, they led to the practice of subinfeudation, which he deems the true commencement of feudal tenures. Mid. Ages, c. ii. p. 1., c. viii. p. 2.

(*c*) See Mr. Butler's note to Fearne's Ex. Dev. 563.

rence of the heir in an alienation.

and his consent had been always required, that conclusion would be just, according to the ancient maxim, that a living person has no heir. But it seems clearly used by the highest authorities in its popular signification, and merely means heir apparent or heir presumptive. (*a*) This was certainly the case among the *Saxons;* for in *their* grants nothing was more common than to provide for several heirs of the donee (*b*); whereas, in the strictness of modern times, an *heir* involves the idea of *unity;* and even coparceners form but *one* heir (*c*); which shows that, when such was the intention, a limitation to the heirs might formerly have amounted to a *designatio personæ.* And we may further observe, that *immediately* on the introduction of the feudal law, there appears to have been a distinction between fees by purchase and fees by descent; the general requisition of the heir's concurrence being restrained to the latter. (*d*) The law likewise discriminated between *lineal* and *collateral* heirs; and although it prevented the ancestor from depriving the latter of their distinct but remote interest in the feudal donation, except by their own act, yet it trusted him with the interest of his *immediate* or *lineal* descendants (*e*); either presuming (as Coke seems to sup-

(*a*) Co. Litt. 94. Wright, 167.

(*b*) Smith's App. Bede. 773.

(*c*) See this principle elaborately explained by Eyre C. J. in the case of the Barony of Beaumont. 3 Cruise Dig. 234. 3d ed.

(*d*) Co. Litt. 94. Wright, 168. Blackstone, however, *though he cites these authorities for his position,* lays it down in unqualified terms, that the feudatory could not alien his estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir. 2 Comm. 287.

(*e*) Wright, 168.

pose) that no man would unnaturally prefer a stranger to the heir of his own blood (*a*), or (as Craig has alleged) *quia ob patris factum indigni reputabantur*. (*b*) So early as Glanville's time, however, we find that one could not even dispose of his own acquirements (*quæstus*) so as totally to disinherit his children. (*c*)

While, however, feudism remained in this state of bondage, the *allodium*, or propriety of the land, was with some exceptions capable of entering into those modifications which characterise real ownership at the present day: but the circle of this species of property rapidly contracted, and yielded to the doctrine of tenure, and about the year 800 it became almost lost. (*d*)

Such was the state of things in England, when she had received the yoke of the Norman Conqueror; it is from this, her energy augmenting as the light of civilisation unfolded the advantages of commerce, and the pleasure of prospective disposition, she is eventually emancipated.

Introduction of conditional fees.

IV. This brings us to the epoch which forms the germ of the doctrine of settlements. In order to strengthen the ties between lord and tenant, or more probably to make such a disposal to the collateral branch of the donor's family, as would confer all the privileges of property, but that of alienation, it became usual to give lands to a particular line of heirs exclusively, in default of which they should revert to the donor. (*e*) And although

(*a*) 1 Inst. 373., in a similar case.
(*b*) De Jur. Feud. 346.
(*c*) Lib. vii. c. 1.
(*d*) Vide Craig, lib. i. t. 4.
(*e*) See Bract. lib. ii. c. 6. Fleta, lib. iii. c. 9. Britt. c. 36.

in England this mode of granting was unknown for some time after the conquest, yet was it congenial to the principles of the feudal system, and in truth identical with the *feudum talliatum*, which, as Craig observes, *tenorem successionis semper servandum jubet.* (*a*)

But the fountain of Saxon jurisprudence, which had been disturbed and obstructed by the superinduction of feudal tenures, was now, in the reign of Henry III., breaking forth and resuming its pristine purity; and the judges, with that integrity and independence which already adorned their character, by applying to conditional fees a maxim of the common law, disappointed the ambitious nobility who introduced them for the purpose of monopolising the real property of the realm. Upon the ancient, and still existing rule, that *on the performance of a condition the estate of the grantor becomes absolute,* they held, that the donee of a conditional fee acquired a power of alienation, and certain other privileges of a tenant in fee-simple, on the birth of that species of heirs to which the limitation was made. (*b*) The adoption and effective application of this principle; which rendered vain the contrivance of the barons, evinces the zeal of the judges for the interests of society, and their steady observance of the common law.

Conversion of conditional fees into estates tail.

But the spirit of feudality still pervaded the legislature: this evasion was passively endured but for a short time; and the statute *De donis* (*c*) was

(*a*) Craig, lib. ii. tit. 16. s. 3.
(*b*) Plowd. 235. 241. 1 Inst. 19 a. 2 Ib. 333. 7 Rep. 34 b.
(*c*) 13 Edw. 1.

passed in the next reign, to compel the courts to obey the intent of the donor of a conditional fee, to render the lands in the hands of the tenant inalienable, and to convert the right of the grantor from a possibility of reverter to an actual reversion. (*a*)

V. We are arrived, therefore, at the second epoch in the history of settlements, viz. the creation of *estates tail.* An estate of inheritance, limited to the heir or heirs male, &c., of the body of the donee, now no longer for any purpose expanded into a fee simple on the birth of issue: on the contrary, the lands might descend through any number of claimants under the original gift in tail, and on the failure of them revert to the donor. So that he did not, as before, claim a mere right or possibility of reverter; — his interest was recognised as an actual *reversion* (*b*), which clothed itself with the qualities of a reversion on an estate for life. And hence it followed, as a necessary consequence, that a *remainder* might be limited upon an estate tail; because it was evidently not the *whole inheritance,* like a conditional fee, but only a *particular estate.* (*c*) This effect forms a striking contrast with the Roman law; for the person in remainder, though a sort of collateral heir to the antecedent tenant in tail, was perfectly independent of him, and could not in any way be affected by his acts or engagements. Whereas an heir in the civil law represents the person, and continues the liabilities, of his ancestor. (*d*) It was, however, though an anomaly

System of settlement consequent on the introduction of estates tail.

(*a*) Plowd. 248. 2 Inst. 335.
(*b*) Plowd. 248. 2 Inst. 335.
(*c*) 2 Inst. 335.
(*d*) Vide But. Co. Litt. 191 a. s. 6., 3.

to the English themselves, in perfect harmony with the relation between lord and tenant in the feudal code, which gave every heir a right, very similar to that of the issue in tail, of claiming under the original donation. Hence, by the conversion of conditional fees into estates tail, was framed a system of settlement, which admirably answered the views of the powerful order by whom it was produced.

VI. But the calamitous depression, which is always consequent on the reduction of property to a state of useless inactivity, was soon felt: the people saw that, in substance, the worst quality of feudism, which they thought eradicated, was revived to flourish with more luxuriance than even when fostered by the spirit of military discipline; and, after a long series of years, casual events conspired with the bent of the nation to liberate intails by the invention of *fines* (*a*) *and common recoveries.* (*b*) These have been succeeded by various other, through in general less efficient, modes of alienation. (*c*)

Precariousness of limitations after estates tail.

VII. Limitations after estates tail being therefore rendered extremely precarious, it became necessary to devise some expedient for protecting the interests of persons in remainder: but the common law was inadequate to this object. An indefeasible provision might indeed be made by way of remainder after an estate for life for persons in being; but, as the nation emerged from poverty and barbarism, marriage agreements grew propor-

(*a*) 4 Hen. 7. c. 24. explained by 32 Hen. 8. c. 36.

(*b*) *Taltarum's* case, Year Book, 12 Edw. 4. 14. 19.

(*c*) See them concisely enumerated, 2 Bl. Com. 115. 119. 1 Cruise's Dig. tit. 2. c. 2.

tionally frequent, in which the children of the marriage (the mutual object of the parties) were the ulterior donees, and of course were not in existence, as those agreements were almost invariably made before the marriage. Now, on principles explained hereafter, a remainder to one not in existence, or *esse*, is generally in the power of the antecedent freeholder (*a*); and though by wrongfully barring the contingent remainder (*b*) he incurred a forfeiture, the penalty to which the act exposed him was no assurance against its commission.

VIII. This inconvenience was for a short time virtually avoided by resort to a system which, though sprung from a mean and dubious origin, had ramified with astonishing exuberance, and hidden the fabric of the common law under its wide-spreading doctrines.

Invention of uses.

The idea of *uses*, which had arisen at Rome to evade the rigour of the municipal law and to neutralise certain disabilities (*c*), was, in the reign of Edw. III., adopted by the English ecclesiastics, to elude the statutes of mortmain. (*d*) The device was suppressed; but, at a subsequent period, when the contending houses of York and Lancaster plunged the kingdom into the horrors of a civil war, those who were regardless of personal safety were nevertheless mindful of their posterity, and uses

(*a*) See Moor, 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chanc. Rep. 170.

(*b*) For a *parent*, who is tenant for life, remainder to his first, &c., sons in tail, to do this, is, as Ld. Talbot has indignantly expressed it (For. 239.), *a most barbarous thing;* yet a Court of Equity has no cognisance of such a case: it is left to the common law. 2 P. Wms. 681. Salk. 680. 3 Atk. 754.

(*c*) Just. Inst. lib. ii. tit. 23. s. 1.

(*d*) Bac. Abr. 22. 1 Rep. 123 a.

were renewed to guard the vanquished against the effects of attainder. (*a*) For a use was a mere right to the profits of the land in equity, while the legal estate remained in another (*b*); and was, therefore, from its nature, exempt from feudal liabilities. And as it fell under the cognisance of the Chancellor who enforced the intent of the parties, however inconsistent with merely positive rules of law, it soon obtained capacities for modification diametrically opposite to the principles of the common law. Thus a use might be declared after a limitation to a person and his heirs, or be created *in futuro* without any antecedent limitation (*c*); and a vested interest might be broken in upon, before its natural determnaition by the operation of an event upon which an ulterior interest was declared; and a power of revocation might be reserved to the grantor, or given to a stranger, which enabled him to subvert any series of existing uses, and to substitute new ones in their places. (*d*) (3)

Qualities of uses.

IX. All these qualities, proceeding from the greater pliability of the equitable usufruct, were far from being repugnant to the sense of the nation: on the contrary, they coincided with those wishes which were suggested by its increased opulence and civilisation. But a confidential owner-

(3) Indeed the whole doctrine of powers, the ramifications of which now form so extensive and important a part of real property, was almost unknown at the common law, and was introduced, and afterwards preserved, by uses.

(*a*) 2 Bl. Com. 329.
(*b*) Gilb. Uses, 1.
(*c*) 1 Rep. 101 a. Jenk. Cent. 8. ca. 52.
(*d*) Bro. Ab. Feoff. al. use, 30. Bac. Read. 13. 1 Cruise's Dig. 368, 369.

ship, springing up in the midst of such a system as that which then prevailed, soon became an infinite source of fraud; and after the legislature had vainly endeavoured to render it beneficial to society, by destroying with a careful hand its deleterious qualities (*a*), it determined to prevent the separate existence of uses, by consolidating them with the land as soon as they were created. Every form which they might have assumed in their fiduciary, they were, however, allowed to retain in their legalised state; and hence a vast alteration was instantaneously effected in real property. We may, therefore, consider the statute of uses 27 Hen. 8. c. 10. as the third memorable event in the rise and progress of settlements.

Uses in their legalised state,

With so much skill and circumspection, however, did the legislature turn this great influx of equitable doctrines into the courts of law, that the beautiful and systematic organisation of the common law estate was in no respect injured. That estate was not only recognised in conveyances to uses, but *the power* which alone enabled the statute to operate; so that uses formed not a *substitutive* but *additional* branch of real property.

Shifting and springing uses.

Shifting and *springing* uses presented an effective method of creating an indefeasible interest to arise at a future period; and settlements might have attained perfection through this new medium, if the judges, now firmly attached to the common law, and unwilling to see its principles sink into oblivion, had not resolved to impress uses with the properties

(*a*) Vide stats. 50 Edw. 3. 1 Hen. 7. c. 4. 4 Hen. 7. c. 17. 1 Rd. 2. c. 9. 2 Rd. 2. c. 3. 19 Hen. 7. c. 15.

and liabilities of common law estates, whenever their modifications were exactly analogous. Hence, when it was requisite to limit an estate for life, and an interest thereupon by way of remainder, a conveyance to uses had no advantage over one merely at common law. Something, therefore, was still wanting for which the statute of uses had not provided.

X. But another innovation consequent on the statute of uses now claims our attention. During the long period in which uses had existed in a separate state a devise of them had been permitted (*a*), because it was in truth a declaration of trust, which acquired a stronger claim to a punctual performance from the sacredness of a death-bed disposition.

Statute of wills.

The sudden privation of testamentary alienation, which followed the blending of the use with the land, was too severely felt to be long endured; and a few years after their union *the statute of wills* (*b*) was passed. The enlargement which this enactment gave to the power of alienation was, in a political view, a most important acquisition; but it is chiefly remarkable for the construction it received from the courts of law, for they conferred on a will the same privilege of creating peculiar interests, which was possessed by conveyances to uses, and what in this was called a *future use* was in that termed an *executory devise*. To estimate the boldness of the analogy, and the magnitude of the innovation, it must be considered that the *judges* obtained those objects in the frame of *the*

Points of analogy and difference in uses and devises.

(*a*) Bac. Read. 20. 1 Rep. 123 b.

(*b*) 32 Hen. 8. c. 1. explained by 34 Hen. 8. c. 5.

land itself, which the legislature had accomplished only in *the use*. The main difference between conveyances to uses and wills (practically taken) is, that a *seisin* is necessary to supply the limitations in the one, whereas, in the other, they are substantive and independent; although, after much doubt, it is now settled that, notwithstanding wills were a species of assurance unknown at the time of passing the statute of uses, a seisin may be granted in them, and the uses declared thereon be executed, as in any other instrument. And, with some qualifications, which this is not the place to consider, uses and devises are parallel doctrines; whence a limitation, which is in the one a future use, would in the other be an executory devise. Wills, however, are *construed* with *peculiar liberality*, because it is presumed that the testator is *inops consilii*; whereas *limitations of use* are now construed with as much strictness as common law limitations. (*a*) But while the judges took upon themselves to invest devises with the qualities of uses, they did not hazard consequences involved in darkness, and possibly injurious to the well-founded rules of the common law. Pursuing the analogy which the absence of livery of seisin from wills justified, they not only gave validity to limitations by devise, which in other assurances were good only through the statute of uses, but clothed them, as we have seen they had uses, with the qualities of an estate at common law when they could enure as such.

Construction of uses and devises.

(*a*) *Tappner* v. *Marlott*, Willes Rep. 180. clearly preponderating the opinions to the contrary, Com. 457.

XI. Hence, therefore, the above-noticed defect of leaving an interest limited by way of contingent remainder after an estate for life in the power of the tenant of the freehold, still remained uncured; to obviate which, resort was had to the tribunal of equity, whose all absorbing jurisdiction over real property forms the ultimate object of our contemplation. We proceed briefly to its origin.

Introduction of trusts.

Partly by a construction of the statute of uses, which the courts held did not execute a use upon a use (*a*); partly upon its narrow wording, which extended only to grants of *freehold* hereditaments to uses; partly by excluding copyholds (*b*) (still wearing the badge of servility) from its operation; and partly upon the rapidly increasing wealth and multifarious demands, which rose out of an enterprising commerce; the *ancient use* was restored in its fiduciary state under the name of *trusts*, though deprived of those qualities which rendered it pernicious. But in rearing this system, the judges who presided in equity, wisely kept their eyes on the doctrine of uses, as regulated in their legal state; and succeeded in preserving a general resemblance. Some corollaries were, however, drawn from the incorporeal nature of a trust, which, unless we assimilate it to an incorporeal hereditament at common law, must be regarded as a deviation from the plan of analogy. An ulterior limitation of a trust, for instance, is secure against the operation of an assurance which would have been tortious in legal estates (*c*); and this circumstance would

Resemblance of trusts to uses.

(*a*) Dyer, 155. 1 And. 37. 136.

(*b*) Cro. Car. 44.

(*c*) Infra, Chap. III. Sect. V.

have peculiarly adapted equitable interests to settlements, if the lawyers, from a conviction of the advantage of giving the beneficial owner as absolute a command as possible over the land, had not preferred making them subordinate and auxiliary to the legal estate, even at a period when they had attained a high degree of perfection. This desirable scheme was realised by interposing between the immediate beneficial freehold, and the ulterior contingent remainder, *an estate of freehold in trustees to support the contingent limitations*, which renders the destruction of them morally impossible; for the *legal* powers of the trustee, though not paralysed, are vigilantly watched by equity, which punishes the trustee when he violates the confidence reposed in him. (*a*)

Invention of the estate for supporting contingent limitations.

XII. We might stop here, because we have now taken a survey of the growth of the various doctrines which we shall examine in the ensuing essay, and which are so closely interwoven that much would be lost by an exclusive adherence to one of them. But I cannot conclude without mentioning the important and laudable practice in equity, of controlling settlements when legal limitations manifestly originate in mistake, and the consequence of tolerating them would be a total frustration of the legitimate designs of the parties. Benevolently deeming the children of the marriage the chief object of regard, equity, when the ground of *contract* or *mistake* warrants its interference, will prevent the husband or wife from exercising a power, unintentionally vested in either of them, of defeating

Practice of equity in controlling settlements, and rectifying marriage articles.

(*a*) Infra, Chap. III. Sect. VI.

their interests. As if lands be limited by marriage articles to the husband for life, remainder to the heirs of the body of the husband by the wife, equity will not suffer him to bar the issue (*a*), though he would have been, in strictness of law, a tenant in tail, and if the marriage articles be even followed by a solemn settlement, which adopts and legalises those limitations, yet under some circumstances, as its being after marriage (*b*), when in the eye of the law the free agency of the wife has ceased, or being before marriage, but in pursuance of the articles (*c*), the court will generally order the lands to be settled strictly. It would be improper to describe here the nice but well-considered distinctions, which govern the courts of equity in the exercise of this power (*d*); and it is merely mentioned, because while it shows how delicately and consistently they proceed when they subvert a solemn, legal instrument, and displays the solicitude with which they guard the interests of unprotected individuals, it at the same time develops a prominent feature in the portrait which has been attempted.

Enumeration of the chief alterations of moment real property.

XIII. To conclude; the old learning of conditions which, when they tended to defeat an estate, were construed strictly (*e*), and which loaded property with a burthen of ceremonies, tolerable only while the simplicity and poverty of the people

(*a*) *Trevor* v. *Trevor*, 1 Eq. Abr. 387., affirmed in the Lds. 2 Bro. Cas. Parl. 122.

(*b*) Cas. Temp. Talb. 20.

(*c*) *Honor* v. *Honor*, 2 Vern. 658. 1 P. Wms. 123.

(*d*) Vide Fearne, C. R. 90 — 113.

(*e*) Such conditions are still *stricti juris*. Rol. Rep. 70. Co. Litt. 119.

made alienation an infrequent occurrence; may now be eluded by the *new modes of assurance*, which *uses*, *devises*, and *trusts*, have happily generated. The necessity of *livery of seisin* to *pass*, and of *entry* to *defeat*, a freehold interest, though not exploded, and still belonging to conveyances at common law, is almost invariably avoided by the ingenuity of the conveyancer; who avails himself of the facilities which those plastic ownerships have provided. And in direct opposition to the simple but ingenuous policy which made publicity the essence of every transaction, and identified privacy with fraud; in modern times estates may be superseded in part (*a*); may shift from one to another (*b*); and may commence absolutely in future (*c*); without any overt act or external circumstance whatever to indicate those important mutations. And limitations which fail of effect as *remainders* are frequently prevented from falling to the ground by an application of the learning of shifting uses and executory devises; while the apparently discordant claims of the common law and its modern rivals are so admirably adjusted, that a perfect harmony is visible to the discriminating student.

Such is the state of real property at the present day, with respect to the power of arranging it in those forms which respond to the exigencies of families. We have traced it from the introduction of feuds in all their military sternness (*d*), refusing

(*a*) 1 Inst. 237 a.
(*b*) Moor, 99. 1 Leon. 264.
(*c*) *Mutton's* case, Dyer. 274 b.
(*d*) The principle of military tenure did not entirely vanish until the 12 Cha. 2. c. 24.

not merely to be moulded at the request of convenience, but scarcely transferable at the call of necessity. We have seen it bursting link after link of its oppressive chain; we have seen the wretched expedient (*a*) of an ambitious clergy, and the desperate resort of a perturbed period, catch vigour from the altered circumstances of the times, and forcing itself up against a reluctant legislature, become a system firm and durable as the common law, and within the boundaries of sound policy (*b*), give ample scope for effectually providing for all who are within the view of rational anticipation.

(*a*) Uses.

(*b*) The classical thesis, '*perpetuus nulli datur usus*,' is as true in its political, as in its moral application. This rule against perpetuities will be mentioned hereafter, Chap. II. Sect. II.

AN

ESSAY

ON

REMAINDERS, &c.

CHAPTER I.

THE NATURE OF A REMAINDER ANALYTICALLY EXAMINED, IN RELATION TO THE DOCTRINES OF CONDITIONS, FUTURE USES, EXECUTORY DEVISES, AND CONDITIONAL LIMITATIONS; SHOWING WHEN A LIMITATION WHICH IS VOID AS A REMAINDER MAY BE GOOD UNDER THOSE DOCTRINES; AND CONCLUDING WITH AN ATTEMPT TO DEFINE A REMAINDER ACCURATELY, BY WAY OF GENERAL DEDUCTION FROM THE ENQUIRY.

I SHALL first examine the nature of a remainder, and endeavour to show when a limitation operates as such, without reference to its specific modifications.

With this view, I shall state Lord Coke's definition of a remainder, and then proceed to a careful analysis of it; requesting the reader to observe that, unless when it is impossible to avoid an allusion to the *species*, what may now be said has respect either to remainders abstractedly, or to the sister doctrines of future uses and executory devises.

Ld. Coke's definition of a remainder.

Lord Coke defines a remainder to be "*a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at the same time.*" (*a*)

This definition, however, appears to me not exactly accurate; and, at the close of our enquiries (1), it may be pardonable to attempt an increase of its logical excellence.

In this chapter an endeavour will be made to show,

I. What estate may precede a remainder;

II. That the particular estate must support the remainder;

III. That the particular estate must be limited at the same time with the remainder;

IV. That the particular estate must be of the same nature or subject matter with the remainder;

V. That the remainder must take effect during the continuance, or at the instant of the determination of the particular estate;

VI. That the remainder must await the natural determination of the particular estate;

VII. To what purposes the particular estate and remainder are the same estate;

VIII. In what conveyances a remainder may be limited;

IX. That the remainder man need not be a party to the conveyance;

X. That the remainder cannot be limited to the grantor himself;

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(1) As a definition is the result of examination, it ought, in the order of things, to follow, not precede it.

(*a*) 1 Inst. 143 a.

XI. That a remainder may be limited to the particular tenant;

XII. That there is no tenure between the particular tenant and remainder man;

XIII. That the term remainder is not requisite to its creation;

XIV. To what subject matter the doctrine applies;

XV. Conclusion.

I. A remainder cannot be limited after any estate of inheritance (*a*), except an estate tail; for every fee simple is the whole estate, and the tenant holds of the first feudal lord. (2)

Remainder cannot be limited after the fee.

If it be a *base* or *qualified* fee, the grantor retains only a right or possibility of reverter; and if it be a fee created by way of use or devise, the right of the ulterior limitee is a future use or executory devise, and not a remainder: for a remainder must be a *remnant* of an estate, and if on the crea-

(2) It should seem, indeed, that at no period of our law, since the introduction of the feudal system, could a remainder be limited after a disposition of the fee. For though when the tenant had acquired the absolute dominion over his property, remainders were encouraged on account of their increasing the number of feudaries, and, consequently, augmenting the political strength of the kingdom, yet when he had once granted the fee-simple, and retained nothing but a seignory (a transfer or limitation of which could merely effect a change of the feudary), as *that* only could be the subject of the remainder, the interests of society were in no way ameliorated thereby. Vide Bac. Abr. Rem. p. 717. 6th edit. by Gwillim, the edition referred to in the ensuing sheets.

(*a*) Dyer, 33 a.

tion of the first estate, no *reversion* be left in the grantor, then is there no *residue* left in him to dispose of, and consequently there cannot in such case be a *remainder*. (*a*) This is the true distinction, and the *dicta* (*b*) which may be found militating against it appear entitled to no respect, as they proceed from not attending to the difference between a *reversion*, and a mere *right of reverter*. (3)

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(3) The manner in which the Chief Justice Vaughan arrives at his conclusion, is very loose and objectionable. Commenting on the case in the text, His Lordship observes, that "when such "a base fee determines for want of issue of the body of B, the "land returns to the grantor and his heirs as a *kind of reversion*; "and if," he says, "there can be a *reversion* of such an estate, "I know not why a *remainder* may not be granted of it." The erroneousness of His Lordship's inference arose from his strange misconception of the nature of a reversion, which is always a present estate concurrent with the particular estate, and conferring, therefore, an immediate right to a future enjoyment, and not (as His Lordship has really described it to be,) a *modus* or quality which is annexed to the lands, and brings them again into the possession of the grantor. This, however, it must be admitted, has been said to be the *natural* sense of the word. See Plowd. Com. 160 b. See a proper explanation of the word, 1 Lill. Convey. 358. As a remainder cannot be granted, except when a reversion is, or rather would have been left in the grantor, it is material to convey a just idea of it. It is defined by Lord Coke to be the residue of an estate, always continuing in him that made the particular estate (1 Inst. 23 a) a description more accurate than that which afterwards occurs. (142. ibid.) Finch neatly exhibits the necessity of a reversion's grounding a remainder, by defining a remainder to be a residue of the estate at the same time appointed over: a reversion to be the residue of the estate *not* at the same time appointed over. Law. 113.

(*a*) Vide Plowd. 29. (*b*) Vaugh. 269.

Illustrations.

From these observations it follows, that in a conveyance at common law (4) to A and his heirs, so long as B has heirs of his body, and after the determination of that estate, then to C, the limitation to C is void (*a*); and that in a devise or conveyance to the use of A and his heirs, and if B shall return from Rome, then to the use of C and his heirs, the limitation to C is good only as an executory limitation. (*b*)

Remainders with double aspect.

But when the prior fee is contingent, an ulterior fee may enure as a remainder, if the latter may vest in the event of the former never taking effect; for in that case the subsequent limitation is not considered as mounted or grafted upon the antecedent limitation, but as concurrent therewith, and to be substituted in its place, in the event of its failure. For when it is not substituted in the place of such antecedent contingent limitation, but to expect its vesting, and then operate by rescinding it, it is not valid as a remainder, although it may enure as a shifting use or executory devise. Hence in a limitation to A for life, remainder to his issue male and his heirs for ever, and in default of such issue then to B, the estate of B is valid as a remainder collateral to the contingent fee in the issue. (*c*) But in a limitation to A for life, remainder to his issue and the heirs of such issue; but

(4) By *conveyances at common law* is of course meant those which are *merely* so, not those which give a use by a transmutation of the common law estate.

(*a*) 1 Inst. 18 a. 10 Rep. 97 b.

(*b*) Bro. Ab. tit. Feoff. al. use, pl. 30.

(*c*) *Loddington* v. *Kime*, 1 Ld. Raymond, 203.

if such issue shall die before twenty-one, then to B, the limitation to B is good only under the learning of uses and devises; for it is posterior (not collateral) to the contingent fee in the issue, as it is not to take effect on a default of issue, but only on the death of such issue under twenty-one; and if A have issue, such issue must take a fee until twenty-one; whence this case is a manifest deduction from the principles above established. But if, in the same case, the ulterior limitation to B is to arise in default of issue, or if there be such issue, then its death under twenty-one, it must operate as a contingent remainder. (*a*) For abstractedly from any construction leaning to the one side or the other, it may enure either as a contingent remainder or as a shifting use, &c. But two inflexible rules have sprung out of the jealousy with which the courts regarded those encroachments on the common law. (*5*)

Rules with reference to future uses and executory devises.

1. That no limitation, which can enure by way of remainder, shall take effect as a future use (*b*) or executory devise. (*c*)

2. That when once a future limitation has taken effect as a remainder, no subsequent event

(*5*) This is the true reason. In *Ives* v. *Legge*, 3 T. R. 488 u. Fearne, C. R. 377. Lord Hardwicke is made to say, "that the "court never construed a limitation into an executory devise "where it might take affect as a remainder, *because the former* "*puts the inheritance in abeyance.*" But we shall see hereafter that neither an executory devise nor future use produces that effect.

(*a*) *Crump* v. *Norwood*, 7 Taunt. 362. 2 Marsh. 161.

(*b*) *Carwardine* v. *Carwardine*, 1 Eden, Ch. Ca. 27.

(*c*) *Goodtitle* v. *Billington*, Dougl. 753.; and see 2 Sand. 388., and 2 Bar. & Cresw. 930.

shall convert it into a future use or executory devise. (*a*) (6)

Hence, in the last case, it is evident, that the limitation to B must enure as a remainder, because it may vest in possession on the death of A without issue, which event does not rescind the prior fee, but merely, as we have seen, brings the concurrent or collateral fee into its place. Hence the limitation to B is called a contingent remainder with a double aspect.

Gift in one event a remainder, in another an executory devise or future use.

It further follows from these principles, that the same gift may be in one event a remainder, and in another an executory devise or future use; as in a limitation to A for life, with remainder to his first son (unborn) in fee, and in default of such son, or if he should die under twenty-one, then to B; B's interest is a remainder in reference to the estate of A, but on the birth of the son instantaneously becomes an executory devise or shifting use. (*b*)

Conversion of an estate tail into a base fee.

Here, however, it must be observed, that if an *estate tail be converted into a base fee* by a bargain and sale, lease and release, or covenant to stand seised, of the tenant in tail, the ulterior limitation is not thereby invalidated (*c*); and for this, it is conceived, three reasons may be given.

1. A *scintilla* of the estate tail is, in con-

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(6) But, from the same principle, a future use or executory devise may, by a change of circumstances, become a remainder. Vide post, Chap. III. Sect. 1.

(*a*) Fearne, Ex. Dev. 498.

(*b*) *Doe* v. *Burnsall*, 6 T. Rep. 30. Doe dem. *Herbert* v. *Selby*, 2 Bar. & Cresw. 926.

(*c*) 10 Co. 95. 2 Salk. 619. 3 Burr. 704.

templation of law, left in the tenant in tail, even after a fine. (*a*)

2. Were the doctrine otherwise, the estate tail might be enlarged into an absolute inheritance, and the remainders and reversions barred without a common recovery.

3. The only ground of the virtual conversion of the estate tail into a base fee is the continuance of the subsequent estate; for the duration of the base fee is measured by the boundaries of the estate tail, and it consequently endures only up to the moment at which such subsequent estate is to take effect in possession. (*b*) (7)

It must not be imagined, that it is immaterial in wills and conveyances to uses to ascertain in what way an ulterior limitation operates; seeing that, although void as a remainder, it may be good in another shape: for besides that the law strictly requires executory devises and future uses *necessarily* (*c*) to take effect within a life or lives in being, and the period of an infancy including gestation, and declares them otherwise to be void, not merely

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(7) In *Seymour's* case, 10 Co. 95., the base fee, derived from an estate tail, was compared with a qualified and conditional fee created by tenant in fee, and pronounced to be "a more "inferior and subordinate estate in fee simple, because a re-"mainder may depend upon it." Ibid. 98.

(*a*) 1 Roll. Rep. 223. Poph. 100. 2 Roll. Abr. 394.

(*b*) 10 Co. 95. 2 Salk. 619. 3 Burr. 704. So if tenant in tail be attainted for treason, the crown acquires only a base fee so long as there is issue of the person attainted, and the remainder is unaffected. Plow. 557.

(*c*) See the certificate in *Stephens* v. *Stephens*, For. 232.

eventually, but *ab initio* (*a*); there is generally a great difference in the qualities and liabilities of remainders and those of executory devices, &c. And therefore, in addition to the observations which have been made to point out their distinctive *indicia*, we may add, that in a will a subsequent interest may frequently be supported as a remainder, notwithstanding a limitation to the heirs of the prior devisee, in consequence of the generality of the word *heirs* being restrained to *issue* (8); as when there is a devise to A and his heirs, and *if he die without issue* (*b*), or (as it is now established) *without leaving issue* (*c*), remainder over. For if, in the first case, the devise passed a fee to A, the limitation over would be void, because there is no pretence for giving it validity as an executory devise by connecting the event (the dying without issue) to the time of A's death, without some special indication of intent, such as the ulterior limitation being for the life of a person *in esse*; and in the second case, the word *leaving* is now considered not to refer more forcibly, in *freehold hereditaments*, to the period of A's death, because the construction by which the first taker has an

When the preceding estate is an estate tail in a will.

(8) In this series of cases (as Mr. Humphreys expresses it in his recent animadversions on real property) the fee simple is *obscurely shaded down* to an estate tail.

(*a*) Fearne, Ex. Dev. 502.

(*b*) *Browne* v. *Jerves*, Cro. Ja. 290. *Doe* v. *Ellis*, 9 East, 382. See, however, *Glover* v. *Monckton*, 3 Bing. 13. But there the limitation was strongly expressive of a fee, being *to the use* of the devisee, *his heirs, executors, and administrators, for ever*.

(*c*) *Dansey* v. *Griffith*, 4 Ma. & Sel. 61. *Tenny* v. *Agar*, 12 East, 253.

estate tail is agreeable to the general spirit of the law, and does not work an injury to the intended objects of the testator's bounty, as in the limitations of a *term*, where (so to speak) the first *estate tail* carries the absolute interest. (*a*) That the word *leaving* should have a different meaning and effect on different subject matters (as it may be) in the same will, has been deemed an absurdity by a great judge (*b*); but the distinction is firmly settled (*c*), subject, however, to the qualifications which accompanying expressions, or additional circumstances indicating intent, may give to it. As, if the ulterior limitation in freehold hereditaments be to take effect on the prior devisee's dying without issue in the lifetime of the ulterior takers (*d*); or without leaving issue behind him (*e*); or if the subsequent limitee be to pay a sum of money, which shows that the testator contemplated a proximate act (*f*); or if there be an express allusion to the decease of the first taker (*g*); in these and similar cases, the primary limitation is *not* narrowed to an estate tail, but is a fee simple, and the subsequent limitation cannot therefore be a remainder; but the event being necessarily to take effect, if at all, within the allowed period, it is a good executory devise.

(*a*) *Burford* v. *Lee*, 2 Freem. 210. *Chandless* v. *Price*, 3 Ves. 99. 6 Ves. 159. *Britton* v. *Twining*, 3 Mer. 183. 17 Ves. Jun. 484.

(*b*) Ld. Kenyon in *Porter* v. *Bradley*, 3 T. R. 143. referring to Ld. Macclesfield's argument in *Forth* v. *Chapman*, 1 P.Wms. 663.

(*c*) Vide 1 P. Wms. 667. 2 Atk. 376. 9 Ves. 197, 203.

(*d*) *Pells* v. *Brown*, Cro. Jac. 590.

(*e*) *Roe* v. *Jeffery*, 7 T.R. 599.

(*f*) *Doe* v. *Webber*, 1 Bar. & Ald. 713.

(*g*) *Doe* v. *Frost*, 3 Bar. & Ald. 546.

Again; if there be a limitation to A and his heirs, and if A die without *heirs*, then to B who is collaterally inheritable to A, his *lineal* descendants are intended, because A cannot die without heirs *general* while B is living. (*a*) And this construction, which supports the remainder by the word *heir* carrying only an estate tail, has been applied to a deed (9), where the intent manifestly required it. (*b*)

It was thought proper to mention these cases, although they do not form exceptions to, or qualifications of the rule that a fee cannot be mounted upon a fee; as the limitations by which the preceding estates are created, are separated only by fine-drawn though just distinctions from those which confer a fee; and in order to demonstrate the line of demarcation it was requisite to allude to the cases in which the fee passes, and in which by consequence the ulterior limitation is altogether void, or tenable only as a future use or executory devise.

When the preceding estate is an estate tail in a will.

But there are two cases in which an estate tail passes, although the limitation is to the heirs, without any thing deducible from the language of the will to show that the intention requires such a construction; and these are,

1. When an alien is made a denizen, and lands

(9) It was a conveyance to uses; but Mr. Just. Bayley adverted to the rule, which, in respect to *limitations*, as contradistinguished from *modifications*, of use, is well established. See 2 Ves. 252. 3 Atk. 784.

(*a*) *Webb* v. *Herring*, Cro. Jac. 415.

(*b*) *Doe* v. *Smeddell*, 2 Bar. & Ald. 126.

are given to him and his heirs, remainder over to another (*a*);

2. To a bastard and his heirs, with such remainder over (*b*);

Where the remainders are good, because neither of them can have any heirs but those of their bodies; whence the law, in order to give validity to the ulterior limitation, spontaneously operates upon the circumstances of the party. (10)

II. *The particular estate must support the remainder;* for a freehold, cannot at common law commence *in futuro* (*c*);

1. Because during the time of strict feudal rigour; it was natural to disallow the cession of the tenancy, and hence on the ending of the estate by its vacancy, the lord was entitled to resume the feud (*d*); 2. Because strangers would have been

(10) In purchases by bastards or denizens, in order to avoid the escheat consequent on their deaths without issue, it is usual to convey the lands to such uses generally as the purchaser shall appoint, and in default of appointment to the use of the purchaser and *the heirs of his body*, or (in the common way) to the use of the purchaser for life; remainder to the dower trustee during the life of the purchaser, remainder to the use of the purchaser and *the heirs of his body*, with (in either form) a remainder over: but the authorities cited show that, where there is a remainder over, it is not necessary, in a devise to a bastard or denizen, to avoid the liability to an escheat by the express creation of an estate tail.

(*a*) 3 Bulst. 195.

(*b*) 1 Roll. Rep. 436. Gilbert (Bac. Abr. Rem. (D) 786.) states these propositions as true abstractedly; but they are applicable only to limitations in wills, as will readily appear by the context of the original authorities.

(*c*) 1 Inst. 217 a. 5 Rep. 94 b.

(*d*) Vide Bac. Abr. Rem. p. 715, 716.

damnified from an inability to prosecute their rights, in consequence of there being none against whom a *præcipe* would lie (*a*); 3. Because livery of seisin being the only manner of passing a freehold in corporeal hereditaments at common law, its immediate subtraction from the grantor was a natural requisition; and the sealing and delivery of a deed in things which lie in grant is a ceremony tantamount to livery, and attended with the same result (11); except in cases of incorporeal hereditaments created *de novo* (*b*), where no sort of inconvenience can arise from a future commencement.

Necessity of livery in the creation of a remainder at common law.

Hence, therefore, livery must be made to the particular tenant, which enures to the person in remainder. (*c*) Consequently an estate at will cannot support a remainder (*d*); because livery to a tenant at will (*e*), or rather the limitation over (*g*), determines the will. Therefore, also, although an interest for years may commence *in futuro*, if a freehold remainder be limited thereupon, and, according as the subject matter lies in livery or in grant, there is livery of seisin, or delivery of the deed, before the day on which the term is to commence, the remainder is void. (*h*) Therefore, also,

(11) None of these reasons applied to wills and conveyances to uses. Hence the origin of one class of future uses and executory devises; viz. such as are to arise on a future event without any antecedent limitation.

(*a*) 1 Inst. 342 b.
(*b*) Bro. Abr. tit. Grant, 86. 8 H. 7. 3. Plowd. 156.
(*c*) 2 Bl. Com. 166.
(*d*) 3 Co. 75.
(*e*) 2 Bl. Com. 166.
(*g*) Bac. Abr. tit. Rem. (G).
(*h*) Cro. Car. 546. 362. Cro. Eliz. 344. 2 Roll. Abr. 7. pl. 8. 1 Inst. 217 a.

if the particular estate be void in its inception, or defeated afterwards, it is generally true that the remainder is likewise avoided (*a*); for in either case the ulterior interest would be a freehold commencing *in futuro*. As, if (for instance) the particular estate be limited during the continuance of another estate, so as to be precisely commensurate with it, and void on the ground of nugatoriness, the remainder limited thereupon is in general also void. Thus, if A be tenant in tail, remainder to B, and B grant to C during the life of A, remainder over, the remainder is void (*b*): for the particular estate cannot pass any benefit to the tenant, and is not, therefore, recognised.

Particular estate void for nugatoriness.

But in this case, if A be tenant for life, the remainder is good, on account of the possibility of forfeiture, which is not a remote possibility. (*c*) But it is clear on principle, that if there be tenant for life of *copyhold lands*, and they be surrendered to A for the life of tenant for life, remainder over, the remainder is bad; because the lord of the manor takes advantage of the forfeiture, and holds during the life of the particular tenant, and not he in the remainder or reversion (*d*); so that such a remainder is on the same footing with a remainder limited after a particular estate during the life of tenant in tail.

Effects of Livery. A deduction of Mr. Just. Blackstone.

But Mr. Justice Blackstone follows up the rule under consideration to an illegitimate consequence, when he asserts that *there can be no intervening*

(*a*) Co. Lit. 298.
(*b*) Sir *Hugh Chomley*'s case, 2 Co. 50. Mo. 342.
(*c*) 3 Lev. 437.
(*d*) 9 Co. 107. 1 Saund. 151. 2 Brownl. 154.

estate between the particular estate and the remainder supported thereby (*a*); observing that the thing supported must fall to the ground, if once its support be dissevered from it. For, in a conveyance to A for life, remainder to his issue unborn for life or in tail, remainder to B in fee, the remainder to B is not only a *valid* but a *vested* limitation, and *supported by the freehold of A.* (*b*) And further, if the contingent be turned into a vested estate by the birth of issue, the estate of A is no longer the support of B's remainder, but the estate of the issue on which it has become immediately expectant; and here, consequently, the thing supported does not fall to the ground by the severance of its original prop, but acquires a new support in the intervening estate. (*c*) Nay further, a remainder which has performed an union with the particular estate, may be disjoined by a subsequently intervening estate, and yet continue valid; as in a conveyance to A for life, remainder to his first son unborn in tail, remainder to A in fee; in which case, during the contingency of the intervening limitation, the remainder coalesces and unites with the particular estate for life, forming one estate of inheritance in possession, and yet parts from it on the birth of a son, and becomes expectant on his estate tail. (*d*)

(*a*) 2 Com. 168. citing 3 Rep. 21. which, however, does not warrant the position; it being there only said that there cannot be a *mean time* between the particular estate and remainder, as well in wills as in grants.

(*b*) 2 Roll. Abr. 119.

(*c*) This observation may be illustrated by *Wegg* v. *Villers*, 2 Rolle's Abridg. 796. pl. 11. 2 Sid. 64. 98. 129. 157.

(*d*) 11 Rep. 97.

Qualifications of the rule, that the particular estate must support the remainder.

But the rule we are treating of admits of three qualifications; 1. It is but partially applicable to uses and devises; for the nonexistence or nonability of the particular cestuique use or devisee does not affect the remainder, inasmuch as no livery is required to be made to a person taking under a will or conveyance to uses, and therefore the remainder may take effect in possession immediately (*a*), so that it is not in truth a remainder, though so entitled in the assurance. Thus, if before the abolition of monkery as a profession, there had been a devise to a monk for life, remainder over; the remainder would have come into possession immediately on the death of the testator. (*b*) And so, if there be a devise or conveyance to the use of J. S, a person not in existence, remainder over to a person in existence; the remainder would immediately take effect in possession. (*c*)

Distinction between conveyances operating by transmutation and those derived from the statute of uses.

Here, however, a distinction is taken between conveyances to uses operating by transmutation, and bargains and sales and covenants to stand seised; for, in the latter, if there be a *void* limitation to one for life, with a *good* remainder over, the bargainor (12) or covenantor shall retain the land during the life of the first cestuique use, as it

(12) The authorities warrant the position of a covenant to stand seised only, but the same principle embraces bargains and sales.

(*a*) Vide 1 Leon. 195. Ld. *Paget's* case.

(*b*) 2 Roll. 415. l. 30. 2 Bul. 292.

(*c*) Pl. Com. 414 a. But, it seems, the person in remainder must be *in esse* when the remainder falls. Vin. Abr. tit. Rem. (C). *Sed vide infra*, 39.

was in him *ab initio*, and must remain in him until drawn out by the consideration: (13) whereas in a conveyance to uses operating by transmutation, the whole estate passes from the grantor, and therefore the remainder-man takes *ex necessitate*. (*a*) But here it may be proper to notice, that it was said by Manwood, in Lord Paget's case, that if one covenant to stand seised to the use of Salisbury Plain for the life of J. S, remainder to A, it was plain he in the remainder should take presently. (*b*) But limitations of this kind, so manifestly absurd, may perhaps be regarded as a qualification of, and not repugnant to, the rule just laid down, and which was established in the same case. (*c*)

It is conceived, however, that if in *any* conveyance to uses, or in a devise, there be a plain allusion to the event which forms the determination of the particular estate, negativing a presumption that the ulterior limitation was intended to take effect before that period, it would enure as a future use or executory devise. (*d*)

The circumstance mentioned is, in reference to the present point, the only one distinguishing remainders in devises and conveyances to uses from

(13) But a valid use in a covenant to stand seised, or, by parity of reason in a bargain and sale, is not prevented from taking effect in possession immediately, by a *general*, and therefore *invalid* power of appointment; reserved either to a stranger or to the covenantor himself. See *Warwick* v. *Garrard*, 2 Vern. 7. *Goodtitle* v. *Pettoe*, Fitz. 299. Sugd. Pow. 114.

(*a*) 1 Co. 101 a. 154 b. Mo. 195. 520. Plowd. 307. 2 Sid. 66. 157. 2 Lev. 77. 2 Mod. 209. Gilb. Uses, 113. 225.

(*b*) 1 Leon. 195.

(*c*) Ibid. 200.

(*d*) Vide Bac. Abr. title Rem. (G).

those created in common law conveyances: for when the particular estate is in actual existence, the remainder is as dependent upon it in the former case as in the latter.

Particular estates which are themselves remainders.

And the reason, which has been mentioned as the exemption of uses and devises from the rule under consideration, applies also to particular estates which are themselves remainders. Whence it is a rule, that if an intermediate remainder be void, the ulterior remainder shall then depend immediately upon the particular estate which carries the possession. As if the first remainder be to a monk, or other incapable person, (*e. g.* the grantor himself) remainder over; this last remainder is good, and shall take effect in possession upon the determination of the particular estate, without any regard to the mesne remainder which was void. (*a*)

Hence, therefore, in a case in which A limited an estate to the use of himself for life, remainder to his executors for twenty years, remainder to B in tail, and A was attainted of treason, it was held that the remainder to B should not wait for the expiration of the period which would have been filled up by the remainder to the executors, had it not become void by A's attainder, but should take effect presently. (*b*) And it was said that if the remainder had been to the administrators of A, which had been merely void for the time intervening after the death of A till administration granted, in such case the remainder to B should

(*a*) 1 Bro. 253. pl. 35. Perk. sec. 566. 705. Godolp. 359. (20). 1 Leon. 197, 198.

(*b*) 1 Leon. 196, 197. 2 Leon. 5. 3 Leon. 20. Moor, 100. Dyer, 309. *Cranmer's* case.

vest in possession presently upon the attainder of A.

But although in wills and conveyances to uses, &c. the remainder may be good, although the particular estate is void; yet in future uses and executory devises, if one class of limitations be void from remoteness, all the limitations over will likewise be void for the same reason. (*a*) A future use or executory devise may, however, be good in one event and void in another. (*b*)

Particular estate and remainder with different titles.

2. When the particular estate and the remainder do not depend on the same title, the former may be avoided yet the latter continue; as, for example, where the particular estate is limited to an infant who waves it (*c*); or, before the statutes abolishing common occupancy, (*d*) to a tenant *pur auter vie* who died living *cestuique vie*; in these and similar cases, notwithstanding its cesser or destruction, the remainder once vested by good title continues. (*e*) And if at this day a rent be granted to A for the life of B, remainder over, and A dies in the life of B, and the terre-tenants (as Yelverton has holden) be entitled to have the lands during the life of *cestuique vie* discharged of the rent, the remainder is not invalidated by this cessation of the particular estate. (*g*) Had the rent, indeed, been limited to the heirs of A, then would they, according to the specific au-

(*a*) Vide Fearne, E. D. 522. 524.

(*b*) *Rogers* v. *Gibson*, Ambl. 93.

(*c*) Co. Lit. 298 a. With reference to Uses see Bac. Uses, 58.

(*d*) 29 Car. 2. c. 3. 14 G. 2. c. 20.

(*e*) Vide 1 Inst. 298 a.

(*g*) Mod. 664. Yelv. 9. *Saltler* v. *Bottler*.

thorities on the point, (*a*) (but which oppugn the frequently found proposition, both in ancient and modern times, that there can be no occupancy of an incorporeal hereditament, (*b*) have taken during the life of B; but an express limitation to the executors would not have let *them* in during the life of *cestuique vie*, because they must have claimed merely in the character of occupants. (*c*)

But in these cases a *contingent* remainder would fail upon principles we shall hereafter examine.

Remainders in copyholds.

3. A remainder in copyhold hereditaments is not dependant upon the particular estate (14); whence, if a copyhold be surrendered to the use of A for life, remainder to B, this remainder, which in freehold hereditaments would take effect in possession on any determination of A's estate, cannot commence in possession before the death of A. So that if A commit a forfeiture, B has not thereby any right to enter, but the lord, who may hold until A's death. (*d*) This doctrine results from the legal freehold and inheritance being in the lord.

There seems, however, to be no ground for the *quære* in Peere Williams, whether if A be copyholder in tail, remainder to B in fee, and A takes

(14) A contingent remainder in copyholds must, however, as we shall see vest, during the particular estate; but not from its dependency thereon. *Vide infra*, Chap. III. Sect. VI.

(*a*) Vaugh. 201.

(*b*) 2 Roll. Abr. 150. Occupant (C), pl. 1. Co. Lit. 41 b. Lord Eldon's remarks, 7 Ves. 448.

(*c*) Vide 2 Bac. Abr. 566, 567. Estate for life and occupancy.

(*d*) 9 Co. 107. *Margaret Podger's* case. 1 Saund. 151. 2 Brownl. 154.

a grant of the freehold from the lord to him and his heirs, and dies without issue, B is entitled (*a*); because it is an established principle, that the enfranchisement of a copyhold, by conveying the freehold to the particular tenant, does not divest the remainder or reversion, but enures to the benefit of the person entitled to it. (*b*)

Remainder must be limited when the particular estate is created.

III. It is a rule that *the remainder must be limited and given out at the same time that the particular estate is created* (*c*): for if the latter be created without any ulterior limitation, a reversion remains in the grantor; and if livery be made to the particular tenant, its operation must be manifestly confined to the latter. If, therefore, the reversioner makes a subsequent conveyance, he deals only with his reversion which is concurrent with, and not, like a remainder, expectant upon, the particular estate. Now the reversion is an incorporeal hereditament of freehold quality, which cannot, by a common law limitation, be made to commence *in futuro* any more than land; and consequently if the reversioner afterwards grant an estate to commence from the determination of the particular estate, it is a freehold commencing *in futuro*, and void. (15) And if a reversioner devise

A reversion cannot be made to commence *in futuro*.

(15) This point has been the more enlarged on, because an author, whose works form the chief basis of the student's pursuits, and the chief ornament of juridical science, has talked of the creation of a remainder *after the creation of the particular* estate, and of the manner in which livery is to be made to the person intended to take such remainder (see 2 Bl. Com. 314.);

(*a*) 3 P. Wms. 10 n.
(*b*) *Margaret Podger's* case, 9 Co. 104. 107. *Bicknel* v. *Tucker*, 2 Brownl. 134. 153.
(*c*) 1 Inst. 49 a.

to the heirs of the body of tenant for life, it is void as a remainder, and can enure only as an executory devise. (*a*) And were he to make a similar limitation by way of use, it would for the same reason be capable of enuring only as a future use. So strict is the law on this point, that even when the grantor attempts or (so to speak) *purports* to create a particular estate, and to limit a remainder thereon, if it be not legally *originated*, it is void, though its antecedent existence, or rather retrospect to a prior period, is only in fiction of law. On which principle, if the heir endow his mother, remainder over, the remainder is void, though livery be made; because of the relation which the dower has to the time of the husband's death. (*b*) So it has been said, that if the lessor disseise his tenant for life, and after make a new lease to him for life, remainder over, the remainder is void, because of the remitter of the lessee to his first estate for life. (*c*) (16)

Remainder must be created in

Hence, therefore, it is regularly true that the remainder must be created in the same instrument

a doctrine which manifestly clashes with Ld. Coke's definition of a remainder; and (though the writer is not aware that it has been noticed) is erroneous in principle, and unsupported by the authorities on which it professes to be founded.

(16) *Quære:* for the lessee should seem to be precluded from a remitter to his original estate, by his voluntary accession to the new estate gained by tort. See 3 Black. Com. 20. 190. This principle even prevails in the Courts of Equity. See 2 Sch. & Lef. 103.

(*a*) *Snowe* v. *Cutler*, 1 Lev. 135. Raym. 162. The cases of *Moore* v. *Parker*, 4 Mod. 316. *Weale* v. *Lower*, Pollex. 66. *Doe* v. *Fonnereau*, Doug. 486. illustrate the same principle.

(*b*) Plowd. 25 b. Godb. 355.

(*c*) Ibid.

with the particular estate. (*a*) Thus, if there be a lease for life, and afterwards a confirmation of that estate, remainder over, the remainder is void; for the confirmation gives no new estate to the lessee, nor even enlarges his old estate (*b*), and the limitation of the remainder is, it seems, void as a grant of the reversion; 1. Because it is not so to operate; 2. Because the ulterior limitee is not a party to the deed. (*c*)

the same instrument with the particular estate.

The particular estate may, however, be made by a will, and the remainder by a codicil, or *vice versâ*; for to this purpose they are parts of the same assurance. (*d*)

What instruments are parts of the same assurance.

A remainder may also be limited by an appointment, in execution of a power contained in the conveyance, by which the particular estate is created; and yet the rule we are speaking of virtually applies to limitations of use by way of appointment; because, from the retrospective relation which appointments bear to the instrument containing the power, they are considered as legally inserted therein. (17) If, therefore, there be a limitation to the use of B for life, with remainder to such uses as B shall appoint, and B appoints to C in fee, C's estate, when raised, is a remainder

(17) Mr. Fearne has left unnoticed this important exception to the general rule, Vide Cont. Rem. 302. But his just and powerful reasoning (p. 74.) on the rule in *Shelley*'s case, in relation to appointments, holds *à fortiori* to the present point.

(*a*) 1 Inst. 49 a.

(*b*) 1 Bro. 253. pl. 45. Plowd. 25 b.

(*c*) Litt. s. 573. Co. Lit. 317. Plow. 160 b. Dyer, 126 b.

(*d*) *Hayes* v. *Ford*, 2 Bl. Rep. 698.

expectant on the estate of B. (18) And, of course, the same rules by which a remainder is distinguished from a future use, when the particular estate and ulterior limitation are contained in the same assurance, apply when the former is in the conveyance creating the power, and the latter in the appointment; for, from the legal incorporation of the two instruments, the appointment being deemed part of the original conveyance, the act of appointing is, in truth, only an event upon which an ulterior use arises; and though its retrospect is attended with peculiar effects, yet so far as regards *the manner* in which the use it creates is to operate, it is no way different from any other event.

Remarks on limitations intended to operate as remainders in appointments.

It sometimes happens that an instrument purporting to be an appointment, and to create a remainder, fails of its object, by limiting the use to a trustee for the intended *cestuique* use. Thus, if there be a conveyance to the use of A for life, remainder to such uses as A shall appoint, and he appoints to B to the use of C, the limitation to C is void as a remainder, because not a legal estate, and consequently of a different quality and nature from the estate of A. It is, however, good as an executory trust. (*a*)

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(18) Some respectable text-writers, however, do not assent to this conclusion. Mr. Preston lays down the unqualified proposition that "all estates arising from the execution of "powers operate either by way of executory devise or shifting "use." 1 Abst. 115.

(*a*) See and consider *Hopkins* v. *Hopkins*, Forrest. 44. 1 Ves. 268. 1 Atk. 521. *Gale* v. *Gale*, 2 Cox. Rep. 136. as to the validity of the limitation as an executory trust.

So, sometimes when a person has a power and the fee in default of appointment, and the power is destroyed, but the party (still seised of the legal estate) makes an appointment, which is in consequence invalid, and the clause of further assurance is called into action, it is manifest that no limitation therein can enure as a remainder expectant on the particular estate in the instrument containing the power. And it may be inferred that no limitation *intended to operate as such* would be good as a future use, 1*st*, unless a new seisin be created; 2*ndly*, unless the antecedent use be such an estate, that a limitation to commence on its determination will not exceed the period allowed by law for suspending alienation (*a*); except, however, when the use created in the conveyance containing the power is an estate tail; because it is then barrable by recovery, and consequently not within the reason of the rule against perpetuities.(*b*)

We may conclude this point with observing, that when the legal fee is outstanding in trustees, and the modifications of the beneficial ownership are merely equitable, which they are in practice always considered to be when the trustee does not join (19) in the conveyance, it is immaterial to inquire the precise operation of the ulterior limit-

(19) This depends on the question whether the statute 1 R. 3. c. 1. is repealed. It is generally so considered, but that opinion may be justly doubted on principle. See *Blake* v. *Foster*, 8 T. Rep. 487. 494.

(*a*) *Vide supra*, 30. 31. Also 102. 4 Ves. 337. 2 Ves. jun. For. 232. 3 T. R. 146. 7 T. R. 357.

(*b*) Fearne, 424.

ation; for all future limitations of a trust are valid when they would, if legal, enure as future uses; and it is believed, that there is no case in which an equitable remainder does not possess the same qualities and incidents as an executory trust.

IV. *A remainder, it seems, can only be supported by a particular estate of the same nature or rather subject matter with itself.* It is, however, difficult to imagine how a limitation can be a nullity on this account; for if there be a conveyance to trustees and their heirs to the use of them during the life of A, and upon trust for him, and after A's death then to the use of the heirs of A, the ulterior limitation to the heirs cannot, it is true, be expectant as a remainder on the equitable estate of A, as A has *nothing* recognised by *law;* yet it may be supported by the legal freehold in the trustees, as that estate is exactly commensurate with the equitable interest for life, and determines, therefore, at the very moment at which the remainder is limited to commence. (*a*) And in cases in which the trustees take the whole legal fee, there can of course be no difficulty; because a similar limitation would then be good either by way of remainder, or as an executory trust according to the frame of it. That a particular estate at common law is capable of supporting a remainder by way of use, (as if one bargains and sells his land

(*a*) *Tippin* v. *Cosin*, Carth. 272. 4 Mod. 480. *Else* v. *Osborne*, 1 P. Wms. 387. The point in the text is clear, and was involved in, though not expressly decided by, these cases.

after seven years (20),) cannot be deemed an exception to the rule which has been laid down.

V. It is a rule that *the remainder must take effect during the continuance of the particular estate, or at the instant of its determination.* (*a*)

But it is sufficient for the remainder to vest in the very instant of the determination of the particular estate; as in the grant of a rent to the tenant for life of the land for his life, remainder over; the particular estate becomes suspended, and the remainder vested in the same moment (*b*); though, indeed, it has been held that this remainder is not good, in consequence of the particular estate being suspended as soon as granted. (*c*)

Whether the remainder is good, when the preceding estate is suspended as soon as granted.

The same doubt arose in a case in which A was copyholder for life, remainder to B in fee, and B surrendered to the use of A for life, with remainders over. (*d*) Contradictory reports of this case have come down to us; but it is decidedly analogous to the above remainder in the rent, in favour of which Lord Coke's authority is express: but it is humbly apprehended, that if the ultimate limitation in the surrender by B was void as a remainder, the opinion of the court, as expressed

(20) See Bacon's Uses, 63., where *an estate for years* at common law is said to continue in the bargainor. This doctrine has, however, been much shaken, and the leaning of the authorities is certainly the other way. See 1 Leo. 195. 1 Rep. 154. Poll. 65. 12 Mod. 39. *Sed vide infra*, Chap. II. Sec. 1. where Bacon's conclusion is defended. See also, Chap. III. Sec. 3. *infra*.

(*a*) Plowd. 25.
(*b*) Co. Lit. 298 a.
(*c*) 2 Roll. Abr. 415. pl. 2. 3 Dyer, 140 b. pl. 41.
(*d*) *Wade* v. *Batch*, 1 Saund. 140. 1 Sid. 360. 2 Keb. 341.

in Saunders, that it was good by way of present estate as a grant of the reversion, is untenable; for can we say that the *reversion* could pass when the surrenderor had himself only a remainder? (21) And therefore the report of Siderfin, that the limitations ulterior to the limitation to A were held by three judges to be good by way of remainder, (and which therefore coincides in the above-mentioned analogy, and with the spirit of our law which, whenever it is possible, gives application to the maxim, *res magis valeat quam pereat*) is that on which we may rely.

So in a lease to A for the life of B, remainder to A for his own life, the remainder is well created though it comes immediately into possession (*a*); for the particular estate has a momentary existence, during which the remainder vests; the object of the law being only to prevent a chasm or suspense of ownership.

This rule, however, is more peculiarly referable to contingent remainders, in reference to which it will be more fully spoken of hereafter. (22)

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(21) The second resolution in *Badger* v. *Lloyd*. 1 Salk. 232. 1 Ld. Raymond, 525, the case cited by the learned editor of Saund. Rep. (Mr. Serg. Williams) to fortify the decision before him, is irrelevant; for the argument of the Court was, that the devise of a *reversion* after the death of tenant in tail without issue was a present devise. And it was admitted in the third resolution, that such a devise of a *remainder* would be void. In Bac. Abr. Cop. (H) the report of Saunders on this point is adopted, but Siderfin cited without any notice of the variance. 478. 4to edit.

(22) As any estate, even a lease for years, (*vide* Dyer, 279, pl. 7. Cro. Jac. 455.) created by tenant in tail to commence

(*a*) Vide infra, Sect. XI.

VI. A remainder must be limited so as to *await the natural determination of the particular estate, and not so as to take effect on an event which prematurely determines it.* (*a*)

Distinction between a limitation and condition.

And hence the necessity of distinguishing between a *limitation* and a *condition*, the former embracing all estates to which fixed boundaries are prescribed, beyond which they cannot pass, inasmuch as by the very terms of the grant they naturally expire when arrived at those limits. Thus when the grant is *so long as*, or *until* &c. (*b*) and after the determination of the estate so granted, then over, the anterior estate expires by limitation, and *cæteris paribus*, the interest ulterior thereto may be a remainder.

But *conditions* comprise all those events which, whether produced by, or independent of, the agency of the party, work the destruction of the estate they are annexed to; and these, therefore, can never be the foundation of a remainder dependent on that estate.

This appears to be the true distinction between a limitation and condition, and it is conceived that

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after his death, is void in its inception, it would be inaccurate to account for the voidness of a remainder limited by him to commence at that time, on this principle. The true reason of the nullity of the limitation, whatever form it assumes, is the paramount right of the issue, who take *per formam doni*. See 2 Co. 52. Cro. Eliz. 279. Yelv. 51. Moor, 883. 1 Leon. 110. 1 Anders. 291. 3 Leon. 291. Cro. Eliz. 895.

(*a*) *Cogan* v. *Cogan*, Cro. Eliz. 360. 2 Leon. 16. Plow. Com. 24 b. 29 b. Co. Litt. 214. 377, 378. *Sayer* v. *Hardy*, Cro Eliz. 414.

(*b*) Co. Lit. 234, 235. Co. 10. 42. Plow. 413. Litt. 90. Dyer, 290.

the observations of Mr. Butler in his edition of Fearne (*a*) are somewhat adapted to mislead the student: because, instead of referring their creation to the respective words on which the law has impressed the peculiar efficacy of producing either the one or the other, that gentleman seems to make the distinction between them consist in the collateral determination of the grantee's estate being in the one case incorporated into the original limitation, and in the other *not being inserted into, or making a part thereof;* whereas if the conditional words are *sub conditione, proviso,* or *ita quod,* (*b*) which make a condition *ex vi termini,* the circumstance of their being blended *in the language of the grant* with the original limitation can make no difference. But if lands be given to A and the heirs of his body, *if* he and they shall so long continue tenants of Dale, no condition is created, because the words *si contingat* are inadequate to that object without an express power of re-entry. (*c*)

To what the creation of conditions ought to be referred.

It is, however, incidentally observable, that in wills any words are allowed to make an estate conditional, in which the intent plainly requires that construction, as in a devise to A, paying &c. (*d*)

Conditional devise to the heir construed a limitation.

But, whatever the words may be, when the devise is to the heir they are construed to create a limitation (*e*); and the performance of the condition or happening of the event forms, therefore,

(*a*) Cont. Rem. 10, 11.
(*b*) Co. Litt. 204. Co. 2. 70. Dyer, 152. 311. Litt. 328—331.
(*c*) Ibid.
(*d*) Co. Litt. 236, 237. Dyer, 138. Plowd. 142. Co. Litt. 204. Co. 10.
(*e*) *Wellcock* v. *Hammond,* Cro. Eliz. 204.

in contemplation of law, the boundary for the natural expiration of his estate; and consequently an ulterior interest, which would in any other case be referred to, and supportable only under, the doctrine of executory devises, may in this enure strictly as a remainder. This case must be regarded as an anomaly, or more properly as the result of a peculiar rule, which the union of the heterogeneous characters of the person liable to the condition, and the person to take advantage of it, gave birth to.

The case last put does not, therefore, form an exception to the rule, and it is in fact unexceptionable. For the doctrine of remainders is strictly at common law, which gives a right of entry for condition broken to the grantor only, and when he enters thereupon he is in of his old estate (*a*), and consequently the ulterior estate would be destroyed.

Grantor cannot defeat an estate created unconditionally.

But the law will not allow the grantor to defeat an estate which he has created unconditionally; and therefore if there be a lease for life on condition, remainder over, (where there is no inconsistency in the limitation of the remainder, because it is to expect the natural determination of the preceding estate,) the law, in order to preserve the remainder, reasonably adjudges the condition annexed to the estate for life to be waved by the subsequent limitation; and consequently the condition is void, and the remainder good. (*b*)

And if this case be referred to the ground of intention, such limitation (it is conceived) is a

(*a*) Co. Litt. 202 b. (*b*) *Butt's* case, 10 Rep. 41 b.

circumstance raising a presumption for this construction, not to be repelled by any thing less than an express declaration to the contrary.

Remainder on a condition annexed to the particular estate.

But a remainder, limited to commence on an event or condition annexed to the preceding estate, and to defeat it, is inconsistent in its very limitation, and consequently void; as in the instance of a lease to A and B, remainder over to a stranger after the death of the one who shall die first (*a*), where for the remainder to take effect it would be necessary to remove the freehold of the surviving lessee; to accomplish which, and give effect to the remainder, are incompatible objects.

But, upon the same principle that *res magis valeat quam pereat*, the law will if possible so construe the words upon which the subsequent limitation is suspended, as to give it validity; and consequently when the language of the instrument does not manifestly require its immediate commencement in possession on the occurrence of the event, it will be considered to point only at the time at which the remainder is to vest in interest. Thus, if there be a lease to A for life, and if B shall do a certain act, *then* the lands to remain to C; it is presumed, in favour of the limitation to C, that it was not intended to vest in *possession*, but in *interest* at the happening of the event (*b*): but if it be said, that on that event the estate of A shall cease, or that the lands shall then immediately remain to C, the expression of the party silences the implication of law, and nullifies the remainder. (*c*)

(*a*) Plowd. Com. 29b. 2 Leon. 16.

(*b*) Plowd. 32. *Colthirst* v. *Bejushin*, Plow. 23.

(*c*) Plowd. Com. 29b. 2 Leon. 16.

But though the law thus disallows remainders when to take effect in possession on an event which works the destruction of the preceding estate, it recognises a species of estates which displace preceding estates. This doctrine of estates to be enlarged upon condition occurs when the performance of a condition, or happening of an event, has the effect of destroying a particular estate, and enabling an ulterior interest limited to the same person to vest in possession. Lord Coke, with his usual profundity, has defined the extent of this learning (*a*); and it is superfluous here to enumerate the ingredients which he has declared requisite to the validity of the future interest. I shall, however, observe that the doctrine of estates to be enlarged upon condition, which, with some qualifications, admits not only estates in tail or for life, but *estates for years*, to be expanded on the performance of a certain act, or the happening of a certain event, is no deviation from the principle we are treating of, because as the estate to be enlarged is in the grantee at the time of the condition, it would have been absurd to have required an entry from the grantor, and consequently the *increase* is deemed good. Still, however, as the event which grounds the increase defeats or abridges the particular estate, and the ulterior larger estate is not expectant on the natural determination of the preceding estate, such increase is not a remainder.

Estates to be enlarged upon condition.

I must here beg leave (but with great deference) to express my dissent from an opinion of Mr.

(*a*) 8 Rep. 74. in Ld. *Stafford's* case; et vide Fearne, 279.

Effect of a limitation to the survivor of two lessees.

Fearne's, with regard to the effect of a lease to two for their lives, with a limitation over in fee to the survivor after the death of the first of them, *in words expressive of an immediate commencement in possession*, and which, therefore, would have been void if to a stranger. (*a*) Mr. Fearne thinks such a limitation strictly a remainder; but his reasoning appears to me to show only that the *common law* may consistently allow it to be valid, inasmuch as it is not within the scope of the policy which excluded all *conditional* limitations. But I am at a loss to perceive the line which separates such a limitation from the doctrine of estates to be enlarged upon condition. Mr. Fearne affirms that the life estate of the survivor is "not *rescinded* or "*nullified*, but embraced in the afflux of a greater, "into which it runs under the technical term of "merging:" but this equally applies to an estate which is avowedly an *increase* of the particular estate. The same objection may be made to Mr. Fearne's remark, that the limitation does not operate to the prejudice of another, viz. the person otherwise entitled to the particular estate, because it was to that very person himself. And the proposition that the effect would be precisely the same if the limitation were "*from and after* "*the determination of the estate aforesaid, then to* "*the survivor in fee*," begs the question; for if, from the frame of the grant, the limitation fall not under the learning of remainders, but under that of estates to be enlarged upon condition, it is untenable. And if the point be merely *whether the*

(*a*) Vide Fearne, C. R. 265, 266.

ulterior limitation be expectant upon the natural determination of the preceding estate, which Mr. Fearne has himself strenuously urged to be the true characteristic of a remainder, where is the difference between the death of the first of the two lessees for life, being the act upon which *the freehold of the survivor* is to lose its *individual existence* by the *instantaneous accession of the fee*, and being the act upon which it is attempted to be rescinded by a limitation to a stranger?

If these observations be admitted to be applicable to conveyances at common law, there is nothing to prevent their application to uses and devises. But as this inference may be apparently irreconcileable with the case of Goodtitle v. Billington, (*a*) we will examine the grounds of that decision. That case was *in substance*, and in reference to the present point, a devise to A and B for their lives jointly, and if A should marry and have lawful issue, then after B's death to A in fee; and one question was in what manner the ulterior limitation to A enured: it was contended as *a conditional limitation*, but it was held *as a remainder*. Now, in regard to its being a conditional limitation, we may remember that as the doctrine of future uses and executory devises is, in consequence of its derogating from the common law, never admitted when the limitation is capable of enuring as a remainder; so, by parity of reason, it must be equally rejected when *any other common law doctrine* is applicable to the limitation. It may, therefore, be laid down that when a future interest would,

Observations on the case of Goodtitle v. Billington.

(*a*) Doug. Rep. 735.

if limited *to a third person*, be a future use or executory devise, it will, when limited *to the particular tenant himself*, operate under the common law doctrine of estates to be enlarged upon condition. But here arises the anticipated objection; why, according to this reasoning, was not the ulterior limitation to A, which was decided in Goodtitle v. Billington to have been a remainder, referable to that doctrine, seeing that the freehold, which A had by survivorship, was liable to be merged by its coalition with the inheritance. The answer is, that a fair distinction is deducible between an annihilation of an estate arising by the actual substitution of another estate in its place, (which was the case in the limitation in the lease under discussion,) and a merger, which is produced merely by the contemporaneous and undivided existence of two estates in the same individual. If, for instance, in the case above put, the will had said that *immediately* on the death of B the lands should vest in A in fee, I apprehend that the limitation to A could not have enured as a remainder; but it merely introduced A's estate by words which, in favour of the doctrine of remainders, are held not to refer to the *vesting in possession*, but to the *vesting in interest*. And consequently the estate for life which A might have had by survivorship would not have been *supplanted* or *rescinded*, but have sunk into the fee merely by a consequence of law flowing from the reciprocal action and tendency to combine in two estates standing together in the same person in the relation of particular estate and remainder.

It is manifest from the fundamental proposition

What limitations by way of use or devise are not remainders.

with which this section commenced, that limitations which take effect in possession on events prematurely determining the particular estate in *conveyances to uses* and *in wills*, are not remainders. For although the Judges embued contingent uses which might operate by way of remainder, with most of the qualities of contingent remainders at common law (*a*), yet they allowed them, when not embraced by that doctrine, to retain their primitive properties; because they were valid in uses antecedently to their incorporation with the land, and the statute 27 H. 8. c. 10. executes the use with its original qualities; and consequently preserves their capacity for this peculiar modification. For those uses are in truth only shifting uses, and identical with those which follow a predisposition of the fee.

And such limitations are allowed in wills, because the indulgence which testamentary dispositions claimed, induced the Courts, on the passing of the statute of wills, which was a few years after the statute of uses, to build up a system corresponding with the doctrine of uses. (*b*)

Hence in wills and conveyances to uses, the necessity of a remainder's awaiting the natural determination of the antecedent estate, forms the criterion for ascertaining the mode in which a limitation following the particular estate is to operate.

This, indeed, is not so important as in assurances at common law, because the ulterior limitation is

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(*a*) Vide 1 Rep. 120. 2 Saund. 386.

(*b*) Supra, p. 15, 16.

sustained at all events; yet it is nevertheless material; for although a shifting use or executory devise, or that species of them, which is commonly called a conditional limitation, is equally exposed to destruction with a remainder when posterior to an estate tail, (*a*) yet when following an estate for life it is protected from the consequences of any conveyance by the tenant for life.

Propriety of the term conditional limitation.

The strict propriety of denominating a shifting use or executory devise a *conditional limitation*, when the event upon which the ulterior interest depends does not form the *terminus* at which the legal estate naturally expires, (23) but breaks down the natural barriers of the antecedent estate, (24) will be pointedly exemplified by those cases in which the courts have denied validity to such conditional limitations, unless the doctrine of the common law with respect to conditions be unviolated by the proviso. Thus if the proviso be that the estate of tenant in fee, or tenant in tail, shall cease during his life, it is void (*b*); because in contravention of the common law principle, that an estate cannot be avoided in part by the entry of the grantor for condition broken. (*c*) And again,

(23) As in a conveyance to the use of A in fee, in tail, or for life, until B shall return from Rome, and on such return then A's estate to cease, and the lands to vest immediately in C, in which case the interest of C is a regular limitation or mere shifting use.

(24) As in a conveyance to the use of A in fee, in tail, or for life, and if B shall return from Rome then A's estate to cease, and the lands immediately to vest in C.

(*a*) Pigot, 176.
(*b*) 1 Co. 86 b.
(*c*) Touchst. 127.

if it had been *completely* assimilated to a condition, the wife or husband of the preceding taker would not (as they now are) have been entitled to dower or curtesy (*a*); because the ulterior limitee would then have come in by a title paramount to that of either of those excrescent estates.

Limitations in appointments.

Hence did not an *appointment* possess a peculiar principle which gives it a retrospect to the instrument creating the power, (*b*) it would be singular to allow the continuation of these estates in the one, and to disallow it in the other case. (*c*) For if a conveyance be made to such uses as A shall appoint, and until appointment to the use of A in fee, when he executes the power, the uses which are over-reached and defeated manifestly determine by *mere limitation*; for the appointment is, by the frame of the instrument containing the power, the event which forms the natural boundary of the vested use. Whereas, if in point of collocation, the vested use precede those which are to arise by the appointment, and an express proviso of cesser and revocation be inserted, the suspended use determines by a conditional limitation. But enough has been said to show the logical inaccu-

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(*a*) Vide *Buckworth* v. *Thirkell*, 1 Collect. Jurid. 332. 3 Bos. & Pull. 658 n. not cordially acquiesced in, *vide* Ld. Alvanley's observations in *Doe* v. *Hutton*, 3 Bos. & Pull. 653. but confirmed by *Goodenough* v. *Goodenough*, 2 Dick. 795. and *Moody* v. *King*, 2 Bingh. 447.

(*b*) 7 T. R. 347.

(*c*) That the wife's right of dower is divested by the execution of a power is now, after having long been *vexata questio*, completely settled by the case of *Ray* v. *Pung*, 5 Madd. 310. 5 Bar. & Ald. 568. which was preceded by the Chancellor's opinion in *Maundrell* v. *Maundrell*, 10 Ves. 245, and by *Moreton* v. *Lees*, determined by Richards C. B., and Wood B., and noticed in Sugd. Pow. 339.

racy of affirming (as some writers have done) that *every limitation* by executory devise, springing, or shifting use, which is to take effect on an event, is a conditional limitation: for when the event is (as it may be) the *terminus* of the prior estate, the fixed limit at which it naturally expires, it contravenes all analogy, and violates the propriety of technical language, to give the future use, &c. the *specific* designation of a conditional limitation.

Construction of conditional limitations.

We must observe, that although these conditional limitations defeat an estate when they arise, yet they are not governed by the principle of the common law, which applies to conditions subsequent, and considers them as odious: *conditio odiosa quæ statum destruit secundum verborum proprietatem est accipienda* (*a*); for as words of conditional limitation do in fact *create* estates, they must receive their true and genuine interpretation, *secundum verborum intentionem.*

Requisition of expectancy in remainders explained.

But (to return) the requisition of expectancy in remainders has reference to their original limitation, or to conditions expressed: for if a tenant for life or years commit a forfeiture, a remainder-man may enter and determine the particular estate. And indeed remainders are sometimes bounded in extent by the duration of the particular estate, and consequently without a possibility of taking effect except by its forfeiture. (*b*) Great use is derived in practice from this principle; for without it there would be no validity in the limitations to trustees to bar dower, and support contingent remainders.

(*a*) Touch. 134.

(*b*) *Duncomb* v. *Duncomb*, 3 Lev. 437.

VII. *The remainder is to many purposes, in legal construction, part of the same estate with the particular estate, and not a distinct and substantive interest.* (*a*)

In this fiction (for such it is), the law, with the wisdom and benevolence evinced in its other fictions, consults only the reciprocal advantage of the parties; for when the idea would, if acted on, be prejudicial to either, it is abandoned. Thus, as we shall see, a remainder and particular estate are to purposes of ownership distinct interests; and a remainder, whether in copyhold (*b*) or freehold hereditaments, is not forfeitable by the act of the particular tenant. (*c*)

Their unity is most pointedly exemplified by the following circumstances: —

Cases exemplifying the unity of the particular estate and remainder.

1. The particular estate and the remainder make but one degree; and hence a writ of entry *sur disseisin* may be brought against him in remainder after the particular estate is ended, as well as it might against the particular tenant himself. Thus, if there be a lease to A for life, remainder to B for life, in tail, or in fee, and A die, the law adjudges the freehold in B presently, and he is tenant to every *præcipe* till he disclaims (25) or disagrees to it. (*d*)

(25) Lord Eldon, with his characteristic penetration, has evinced the difficulty of allowing a mere disclaimer by a *cestuique*

(*a*) Vide Bac. Abr. Rem. (T). The form of pleading the seisin of a remainder is derived from this principle. Vide 2 Sand. 236.

(*b*) But by special custom, a forfeiture by tenant for life of copyholds may bind the remainder. 9 Co. 107.

(*c*) Even a remainder expectant on an estate tail, which is forfeited to the Crown by attainder for high treason, as has been already noticed (*supra*, 30. n.) is not disturbed.

(*d*) Hob. 71.

2. If a release by extinguishment be made by a stranger, who has the right to the land, to the tenant of the freehold (as if a disseisor make a lease for life, remainder over in fee, and the disseisee release to the tenant for life) (*a*), it enures to him in remainder. It must, however, be acknowledged, that the law is driven to this conclusion by reason of the impossibility of the release operating as a release of right, unless it acts upon the remainder; as the effect of the release is to obviate the entire tort, and the wrong of the tenant for life is but *partial*, — but commensurate to his limited interest. (*b*) This reasoning is evidently applicable if the release be made to the remainder-man. (*c*) And hence the case may be converted. It is observable that a confirmation to the tenant for life in the case put, does not, like a release, extend its operation to the remainder; for one of the peculiar and most important rules relating to confirmations, is, that an immediate estate may be confirmed without con-

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use to be efficacious. 1 Swanst. 372. in *Nicolson* v. *Wordsworth*. His lordship's idea, of course, grounds itself on the instantaneous operation of the statute, and on the circumstance, therefore, of the *cestuique use* having an actual estate at the time of the disclaimer. His lordship suggested, therefore, the propriety in such a case of *a release with an intent to disclaim*. It is conceived that the same observation is equally applicable to a *remainder-man*, when the conveyance has been made to the particular tenant with due solemnities. This distinction, however, has, it is believed, never been acted on by conveyancers.

(*a*) Lit. sect. 521. Co. Lit. 297.

(*b*) *Ibid.*

(*c*) Lit. 450., because the releasee hath a remainder in deed.

firming a remote estate (*a*); and Chief Baron Gilbert somewhat inaptly puts the case of a confirmation of the estate of him in the remainder by the disseisee, without any confirmation made to the tenant for life, in illustration of the principle we are considering (*b*); for the reason why the disseisee is precluded from defeating the estate for life is merely because the law will not allow him to derogate from his own grant, and destroy the remainder which he has confirmed, by taking away its support. (*c*)

3. In respect to copyholds we may notice two points derived from the principle we are illustrating;

1st, If tenant for life and he in remainder join in a grant of their copyhold, but one fine is due. (*d*)

2. The admittance of the particular tenant, whether for life or years, is the admittance of the person in remainder (*e*) to all purposes except the lord's fines, when the custom requires two several fines (*f*); and (according to the observations with which these cases were introduced) except liability to forfeiture on account of the act of the particular tenant, whether it be an act of omission, as by neglecting to come in and be admitted according to the custom (*g*), or an act of commission as

(*a*) Co. Lit. 297. a. b. (1) n. 256.

(*b*) Bac. Abr. Rem. (I).

(*c*) Lit. sect. 521.

(*d*) 3 Leon. 9.

(*e*) *Church* v. *Mundy*, 12 Ves. 426. But he in the remainder may be admitted to it by himself. 1 Saund. 147. 1 Lutw. 758. *Norton* v. *Ladd*.

(*f*) Cro. Eliz. 504. 662. Moor. pl. 448. 658. Roll. Abr. 505. How far equity interposes between tenant for life and remainder-man, in respect to the lord's fines, see 13 Ves. 246. 252, 253.

(*g*) Cro. Eliz. 879. Yelv. 1. *Baspool* v. *Long*.

waste. (*a*) And this doctrine cannot be considered as in any way shaken by the case in Moor, pl. 119. Cro. Jac. 487, where copyholds were devisable for three lives *successive*, each to take in order as they were named; and the first tenant for life cut timber contrary to the custom, and it was held a forfeiture of all their estates; for, as it has been justly remarked, this was but one entire estate in possession at first; though the custom afterwards shared and divided it to go in succession. (*b*) Hence the limitations after the first were a sort of substitutive interests specially moulded, and sustained by the custom; and not within the reason, nor entitled to the privileges of remainders.

4. A remitter to the particular tenant is a remitter to him in remainder or reversion. (*c*)

5. The disseisin of the particular tenant is the disseisin of those in remainder, and converts their estates to a right of entry. Whence a release enuring by extinguishment, which must, except in a few cases, be made to a person who has an actual estate in deed or in law (*d*), if made to the remainder-man, after a disseisin of the tenant of the freehold, is void. (*e*) (26)

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(26) It appears that a right of entry is equally incapable with a right of action of supporting a release, though, as we shall see hereafter, the common law has, in another case, distinguished between them, and recognised the former as tanta-

(*a*) Vide Gilb. Ten. 246. 250. 305. 2 Ld. Raym. 999.

(*b*) Bac. Abr. Rem. (I).

(*c*) Noy, c. 18.

(*d*) Co. Lit.. 265. The text of Littleton s. 447. is inaccurate, as appears by s. 449.; but the releasee must have an actual estate.

(*e*) Lit. 451.

6. Again, if a person seised in fee convey to one with remainder to another, he cannot annex a condition to the particular estate, so as to defeat that alone; for its destruction involves that of the remainder by a necessary consequence; as when the grantor enters he is in of his old estate. (*a*) Whence also it is manifest, that if the condition be annexed to the remainder, and he enters for the breach of it, the particular estate must fall as well as the remainder (27), because otherwise the the grantor would not, as the maxim of the common law imperatively says he shall, be seised as he was originally. In this the doctrine of remainders is altogether peculiar; for if a reversion be granted, subject to a condition, it of course never affects the particular estate; and, under the learning of *uses* and *devises*, future executory interests spring up in every shape, sometimes by an event independent of human agency, and sometimes by the execution of a power, and only partially defeat the existing interests.

But *in a will* the seisin of the particular tenant is not a seisin to those in remainder to enable them to maintain a writ of entry, &c. until it is actually obtained. (*b*)

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mount to the estate itself, in order to give validity to the remainders which depend on it. Infra, c. 3. s. 5.

(27) Shep. Touch. 155. citing 10 Co. 41. but the authority does not support the proposition. And of course the condition may be *expressly* annexed to the remainder only, by postponing the right of entry to the determination of the particular estate.

(*a*) 1 Roll. Ab. 472. 474.

(*b*) Vide 1 Inst. 111.; 2 Scholes and Lefroy, 104.

Sometimes, also, there may be a particular estate, and a remainder in the same lands, that have no kind of connexion; as, for example, an estate for the life of lessee, by one who is tenant in tail, with remainder over. Such a lease works a discontinuance (*a*), and gains a new reversion by wrong, and until that intervenient estate is removed, nothing can bring the estate for life and the remainder into contact. (*b*)

Limitations originally independent of each other not remainders.

But if the limitations stand *originally* separate and independent, whether from the mode of limitation, as in the instance of future uses and executory devises, or from the situation of the grantor, as in a grant from the king by patent of an honour for life, and then to another (*c*); (where the subsequent limitation does not proceed from a *reversion*, and is, therefore, a *new* grant) in cases like these, the required unity of the primary and ulterior limitations never existing at all, the latter is consequently not a remainder.

A proposition considered.

We may conclude this point with observing, that when the proposition is laid down, that the possession of the particular tenant is the possession of the person in remainder or reversion, we should distinguish between estates for years, and those of a freehold quality. For in respect to the former, the proposition is virtually merged in a principle which was framed when estates for years were precarious and insignificant, and which made the possession of the termor the possession of the

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(*a*) Lit. 620.

(*b*) Vide *Pauling* v. *Hardy*, Skinn. 3. 62. Com. Dig. Surr. 3 Prest. Con. c. 8. *passim*.

(*c*) Show. P. C. 5. 11.

freeholder, to a much greater number of purposes. From not attending to this distinction, Noy is inaccurate in broadly affirming that a dying seised of a remainder or reversion does not take away an entry (*a*); for that rule is only applicable to remainders or reversions expectant on an estate of freehold. (*b*)

VIII. *It should seem that remainders may be created in any species of conveyance*, excepting, of course, those which merely act upon a right, as release by extinguishment, &c. (*c*) The only ones requiring particular attention are those which are derived from the statute of uses, or rather, which, by virtue of that statute changed their equitable nature, by which, like modern contracts for the sale of land, they had merely the effect of making the vendor a trustee for the vendee (*d*), and grew into actual conveyances, viz. bargains and sales, and covenants to stand seised. But as these first pass the use which, by the energy imparted to it by the statute, draws the land along with it, it follows that, unless the use is well raised they cannot operate; and from their giving the use now as before the statute, the peculiar considerations which were originally requisite to them, are still of their very essence. (*e*) When, however, this requisition is satisfied there can be no doubt of their operation. Thus, if lands be bargained and sold to A. for life, remainder to B. the remainder is

Remainders in bargains and sales.

(*a*) Maxims, c. 16.

(*b*) Vide Co. Lit. 239 b. 243 a. 1 Co. 134 b. 8 Co. 101 b.

(*c*) Lit. 467.

(*d*) Vide Plow. 303. 8 Rep. 24 a. 2 Inst. 671.

(*e*) As to bargains and sales, vide 2 Inst. 671. As to covenants to stand seised, Plow. 300. 2 Roll. Abr. 786-7. Rep. 40.

valid, even although the money be paid by the particular tenant; because it is a consideration for all the estates, and shall be presumed to be given for all. (*a*)

And hence it should seem to follow, that a *contingent* remainder may be created in a bargain and sale; for why may not the consideration which is paid by the particular tenant extend as well to the contingent as to the vested interests which are ulterior to his estate? Gilbert's query (*b*), therefore, of the *dictum* of Judge Newdigate, who denies the validity of a contingent use in a bargain and sale (*c*), appears perfectly consistent. But the prevailing opinion is, nevertheless, that such contingent use is void.

Contingent limitations in bargains and sales.

This is a point of importance, and it may be proper to examine the grounds of that opinion. An eminent modern writer objects to the validity of the use, because there is no *scintilla juris*, or possibility of seisin remaining in the bargainor after the bargain and sale to serve it. (*d*) But, without travelling into the doctrine of *scintilla juris*, I may observe, that as a consideration of a bargain and sale is only tantamount in its effects to a declaration of use in a conveyance operating by transmutation, it seems very singular, that contending, as in another place that writer does (*e*), for the existence of a *scintilla* in the one

(*a*) 2 Roll. Abr. 784. pl. 6. 7. Winch. 61. Case of a covenant to stand seised for money; but such covenant would operate as a bargain and sale. Vide 8 Co. 94 a. 7 Co. 40. 1 Ventr. 138.

(*b*) Uses, 198.

(*c*) 2 Sid. 158.

(*d*) 2 Sand. Uses, 52.

(*e*) Ibid. vol. i. p. 110. 114.

case, he should deny it in the other. But his objections will not weigh a moment with those who totally negative a *scintilla* in *grantees* to uses, and who seem now to constitute the largest and most repectable majority. Another writer, whose opinion has great weight, does not go the full length of the above gentleman's idea, but only lays it down, that a *contingent use to a person not in esse* cannot be raised in a bargain and sale. (*a*) We may, I apprehend, reject this qualification, and involve it in the fate of the general proposition. Now, it is clear that the consideration need not be paid on the execution of the bargain and sale (*b*), and it is established in the fullest way, that a consideration paid by one of several bargainees, shall be intended to have been paid by them all, to the intent that the land may pass to them all, according to the meaning of the parties (*c*); nay (as it has been said,) even though the consideration moved from a stranger. (*d*) It should seem, therefore, impossible to draw a sound distinction between a future use arising without any intermediate express estate, but limited to a *certain* person on a *certain* event, or in other words a *springing vested use*, and a *contingent shifting use*, or *contingent remainder* in this instrument. For in both cases they agree in this fundamental point; viz. that they are *executory* limitations. And if it be not necessary that the consideration should be immediately paid, *or*

(*a*) Sugd. Gilb. Uses, 398. n. 2.
(*b*) 1 Leon. 6.
(*c*) 2 Inst. 672.
(*d*) *Per* Ld. C. J. Hobart in *Buckley* v. *Simonds*, Winch. 61.

should proceed from the bargainee himself, wherein is the former case stronger than the latter?

Remainders in covenants to stand seised.

But with respect to remainders in covenants to stand seised, similar doubts, from the nature of the consideration cannot arise; the same reasoning cannot be used; and every limitation to a stranger, however circumstanced, is void. There is, however, one case which deserves notice. Upon the principle mentioned, it has been laid down, that if a man covenant to stand seised to the use of a stranger for life, and after (his death) to the use of the covenantor's son in tail, the use shall arise to the stranger in order to support the remainder. (*a*) That case has been denied by great authorities, and as put in the Touchstone, it is on the same footing with a case subsequently stated, with a different conclusion, in that work (*b*); because there can be no reason for giving validity to a use in a covenant to stand seised, which is not within the scope of the consideration, unless there are no other means of supporting an ulterior limitation, which requires only to be propped by a particular estate. And, therefore, when that ulterior limitation may enure as a future use, the anterior use may be expunged, if declared to a stranger. And in the case just cited from the Touchstone, the ulterior interest was introduced by words which, when there is a particular estate, are regularly introductory of a remainder, but which, if there be none, may give birth to a springing use. For the ulterior limitation to the

(*a*) Touchs. 513., taken from Plow. 307.; but merely put by counsel.

(*b* Ibid. 523.

son is described to commence *after the death of the stranger;* and, therefore, if no use arise to the latter, there is nothing to prevent the interest of the former from taking effect as a springing use; so that the principle upon which the case in the Touchstone founds itself is not drawn into operation. And the rules stated in a former page (*a*) show that there would have been no difference, if the limitation to the son had been *after the determination of the stranger's estate.* But were the doctrine we have canvassed really as reasonable, and as much in unison with the general analogies and equitable spirit of uses, as at first it appears to be, the authorities which condemn it (*b*) would be too strong for it to be relied upon in practice.

IX. As the remainder most properly comes in at the *habendum, it is not necessary that the remainder-man should be a party to the conveyance.* (*c*) Indeed such a requisition would effectually preclude the limitation of a remainder, where the person is not ascertained: and the consistency with which the law has dispensed with this circumstance, is manifest from the most cursory inspection of the doctrine. And the rule applies not merely to assurances *in pais,* but to a fine *sur grant et render* (*d*); for though none can take the first estate by render but a conusor, remainders may be limited to strangers.

(*a*) Pages 38, 39.

(*b*) Gilb. Uses, 285. 4 Leon. 137. 1 Leon. 195.

(*c*) Cro. Eliz. 10. Raym. 143. Carter, 60. Co. Litt. 230 b. Hence if the tenant for life has sealed the indenture, and dies, and he in the remainder enters, he is tied to perform the conditions comprised therein, though he never sealed it. Litt. 374.

(*d*) 2 West's Prec. sect. 30.

X. *A remainder cannot be limited to the grantor himself.* If, for instance, A lease to B for life, remainder to himself in fee, he takes nothing under this limitation, but retains the reversion, or his original estate. (*a*) And hence we find it laid down, that if A acknowledge a fine to B, and B render to A in tail, the remainder to himself (B) for life, this remainder is void. (*b*) And so if A by fine acknowledge lands to B, and B grant and render the land to the conusor in tail, the remainder to B in tail, the remainder to B in fee, the limitation of this estate to B in tail is void, and he can never have execution of it. (*c*) These cases flow from the rule before us; for the remainders to B in both instances are limited to the person making the render, and who is in legal consideration the grantor of the lands; and in both of them, therefore, the fee is in B as a reversion.

It is also an ancient rule, that a man cannot limit a remainder to his heirs, unless he departs with the whole fee simple out of his person. (*d*) If, therefore, a lease be made to A for life, remainder to the right heirs of the lessor, the remainder is void, and A is in of his old estate. (*e*)

Observations on the rules that a man cannot limit a remainder to his heirs.

This rule was productive of no practical benefit to society, but it was essential to the preservation of the feudal system, because the heir (taking as heir) was liable to numerous charges in favour of

(*a*) Dyer, pl. 20. Moor, 720.

(*b*) 24 Edw. 3. 26. 14 H. 4. 31. Dyer, 33, 34. 69.

(*c*) Ibid.

(*d*) *Champernon*'s case, 4 H. 6. 19 b. pl. 6. Earl of *Bedford*'s case, Mo. 718.

(*e*) *Greswold*'s case, Dy. 156 a. pl. 24.

the lord, from which a purchaser was exempt; and it is one of those departments of that great fabric which have remained unimpaired to the present time.

It is, however, but partially applicable to uses and devises. If, indeed, a man by a devise (*a*) or conveyance to uses limits particular estates, and takes back the ultimate estate or fee simple, either to himself or his right heir (*b*) by express limitation, a *remainder* is not thereby created, but he retains the original reversion (28): for although the principles of the feudal system were inapplicable to these statutory formations, they are within the maxim which gives the preference to the operation of law, when it precisely coincides with the expression of the parties. (*c*) But here the agreement between the common law and uses, and the contemporaneous and parallel learning of devises, stops. For if one conveys to the use of A for any particular estate, remainder to the use of the right heir male of the body of the grantor, such heir takes by purchase, because it is a dif-

Application of this rule to uses and devises.

(28) Whether the limitation be in a conveyance to uses operating by transmutation, or in a bargain and sale, or covenant to stand seized, it will be unavailing, as being the old use (see *Fenwick* v. *Mitforth*, 1 Leon. 182. Earl of *Bedford*'s case, Poph. 3. *Abbot* v. *Burton*, 11 Mod. 181.), and will be descendable as such, whether the grantor does or does not take back an immediate estate for life or years. See 2 Prest. Estates 18.

(*a*) *O'Keefe* v. *Jones*, 13 Ves. 413.

(*b*) *Cholmondeley* v. *Clinton*, 2 Bar. & Ald. 625.

(*c*) Cro. Eliz. 321. And herein copyholds agree with freeholds. 4 Burr. 1952. 2 Bl. Rep. 1046., overruling 1 Leon. 101. c. 132.

ferent estate (*a*); and consequently the limitations not being nugatory is not within the scope of the maxim above alluded to. And a covenant to stand seised rests on the same foundation; for the use to the heir male being an estate tail, which from the favour shown to the statute *de donis* is distinguished from other particular estates (*b*), the junction of the seisin and the use in the same individual does not prevent the latter from being served by the former, and executed like any other statute use. (*c*)

And had the limitations upon the fine and render above mentioned (*d*), been by way of use, they would have been valid: for although, if there be a conveyance to A in fee to the use of A for life, whether with or without remainders over, A, it should seem, is not in by the statute, but at the common law, by way of abridgment of estate in possession (*e*): yet if there be a conveyance to A in fee to the use of B for life, remainder to the use of A for life, remainder to the use of C in fee, A takes the estate for life in the use by the statute in order to prevent a fraction of estates. (*f*) On which principle it is, that in common purchase deeds, where the lands are conveyed to the trustee in fee, and subject to a power of appointment in the purchaser, to the use of the purchaser for life, remainder to the use of the trustee for the life of the purchaser, remainder

When the statute of uses operates, notwithstanding the coexistence of the use and common law estate in the same person.

(*a*) Carth. 272. 4 Mod. 380.
(*b*) Vide Bac. Read, 63.
(*c*) 13 Rep. 56.
(*d*) Page 74.
(*e*) Bac. Read. 63., doubted; but, it is conceived, without, sufficient reason, 1 Prest. Estates, 179.
(*f*) Bac. Read, 66.

to the purchaser in fee, the trustee is in of his remainder for life by the statute. (29)

Limitation to the heirs of a surrenderor of copyholds.

It is now settled (*a*), contrary, however, to the opinion of Lord Coke (*b*), that although the surrenderor of a copyhold does not take back an estate for life, a limitation in the surrender to his heirs is equally nugatory as in a conveyance of freeholds. But it is apprehended that such limitation is analogous and referable not to similar ones in common law conveyances, but to those in wills and conveyances to uses.

Gift to the right heirs may be contingent, when.

But though a gift to the right heirs usually confers a vested interest as soon as they are ascertainable by the death of the ancestor, or the removal of the impediment arising from the corruption of their inheritable blood by attainder (*c*), yet it may also be contingent if such be the clear intention; and consequently as such a limitation cannot be the reversion or original estate, because that is always vested, it should seem that persons taking under it are purchasers. (*d*) And it was said by Lord Henley (*e*), that the rule we are considering is

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(29) On any other construction the trustee's estate for life would be unaffected by the appointment; for where a grantee is in by the common law, a power or proviso of revocation is repugnant and void. Co. Litt. 237 a.

(*a*) *Roe* d. *Noden* v. *Griffiths* 4 Burr. 1952. *Thrustout* v. *Cunningham*, 2 Black. Rep. 1046.

(*b*) *Allen* v. *Palmer*, 1 Leon. 101. c. 132.

(*c*) 1 Prest. Estates, 36 to 42.

(*d*) *Ibid.*, and see and consider *Philips* v. *Deakin*, 1 Maul. & Selw. 744. *Swaine* v. *Burton*, 15 Ves. 365.

(*e*) In *Robinson* v. *Knight*, 2 Eden. 159.

confined to the estate of which the ancestor is seised in fee, and that he might make his right heir a purchaser of another estate; as, if he contracts for an estate by way of remainder after particular estates to his own right heirs, it will be a remainder, and vest in them as purchasers, if the ancestor is dead when the particular estate determines.

Remainder to the executors of the grantor for a term of years.

From the anxiety which the law invariably evinces to give effect when possible to every part of an instrument, flows a distinction relevant to the point we are considering, between a remainder to the executors of the *grantor* for a term of years, and a remainder to the executors of the particular tenant himself: for in the first case, as in a conveyance to the use of himself for life, remainder to the use of his executors for years, the executors are recognised as distinct from the grantor himself, and entitled to a contingent remainder by purchase (*a*) (30), which conclusion has been deduced, — 1st, From the unity of person which would otherwise be in the grantor and

(30) In *Sparke* v. *Sparke*, Cro. Eliz. 666. Walmsley J. noticed that the limitation in Cranmer's case was by *way of use*, as well as by the party himself. But that circumstance appears to have been immaterial; for Lord Chief Justice Dyer said in Cranmer's case, that if A *leases* to B for life, remainder to the executors of A for years, the remainder over in fee to a stranger, the remainder for years is good, and the executors shall take it as purchasers. *Vide* 2 Leon. 7. But in the report of the same case, 3 Leon. 20., stress was laid on the limitation being by way of use. Gilbert, however, who puts this case, (Bac. Abr. Rem. (B.) by Gwill.) does not notice that the limitations were by way of use.

(*a*) In *Cranmer*'s case, 2 Leon. 7. Dy. 309 b.

grantee, and which would render the grant null and insignificant: 2nd, From the merger which would otherwise ensue the co-existence of the term and the reversion in the same individual. (*a*) But the last reason only is, strictly speaking, appropriate; for as executors and administrators are in the same correlative situation to the testator or intestate as to chattels, as the heir is to the ancestor in respect to inheritances, it is plain that the first reason is equally applicable to an express limitation to the *heirs* of the grantors, the inoperativeness of which we have just witnessed. But where a stranger limits an estate for life, remainder to the executors of the tenant, for years, the term vests in him, because the word executors is no more than a prolongation of his interest. (*b*)

Remainder to the executor of the tenant for years.

XI. *A remainder may be limited to the particular tenant himself;* as if lands be granted to A for life, remainder to A for years, or to A in tail, remainder to him for life; in these instances the particular estate and remainder are both unaffected; for a prior cannot merge a subsequent limitation, though the latter confers a minor interest; and a subsequent cannot merge a prior limitation, when the latter confers a greater interest. (*c*)

But if the cases put be reversed, by converting the limitations, a merger would immediately ensue; for when a less is followed by a greater estate in the same person, there is nothing to prevent the former from extinguishment. (*d*)

When a limitation merges another in the same instrument.

(*a*) Bac. Abr. Rem. (B)
(*b*) 3 Leon. 23. *per* Dyer C. J.
(*c*) Vide Co. Litt. 54 b. Dyer 310 a. Cro. Eliz. 491. 3 Leon. 22.
(*d*) Ibid.

This rule, however, admits of two exceptions: 1st, When the particular estate is an estate tail, which the statute *de donis* expressly saves from merger (*a*): 2nd, When an estate in a stranger intervenes; as if lands be granted to A for life, remainder to B for life, remainder to A in fee, the immediate freehold is kept from drowning in the remainder in fee by the estate of B (*b*): but B's death during the life of A removes the barrier which disjoined them, and then the estate for life is lost in the remainder.

And if the intervening interest in the stranger be contingent, the estate for life of A undergoes only a qualified merger, or, as it is termed, merger *sub modo*; which is in fact a suspension by uniting with the subsequent remainder, until the intermediate interest vests, and then it resumes its original individual existence. (*c*)

But if the particular estate and remainder in the same person, be of the same quality, and every way equal, the remainder, though immediately consequent on the particular estate, will not merge it. And this is proved by the following case in Coke, who says, that "if a man leases to A "during the life of B, remainder to him during "the life of C, if he commit waste, the action of "waste shall lie against him." (*d*) For the reason

(*a*) So determined in the reign of Edw. 3. Vide Plowd. 296. 2 Rep. 61 a., for the statute would otherwise have been of little effect. But this peculiarity of an estate tail is in favour of the issue, and, therefore, ceases on its becoming after possibility of issue extinct. Bro. Estates, pl. 25. Bro. Surrender, p. 6.

(*b*) See *Duncomb* v. *Duncomb*, 3 Lev. 437.

(*c*) *Lewis Bowles's* case, 11 Rep. 80.

(*d*) 1 Inst. 299.

why A is punishable for waste, is not the merger of the particular estate in the expectant freehold, though that would have the same effect, but because the freehold, which intervenes between the particular estate and the inheritance, is in the particular tenant; wherefore he is not allowed to avail himself of that circumstance to commit waste, because he would then take advantage of his own wrong; whereas if the intervening freehold had been in a stranger (*a*) the reversioner could not have brought waste until his death. Mr. Preston, indeed, in his profound essay on Merger, leans to a contrary opinion, observing that it does not appear that the point of merger occurred to Lord Coke (*b*), which, however, cannot be admitted,

1. Because it is impossible to imagine, that the most acute and learned expounder of our law overlooked that feature in the case, which was the only support of his position; for if he had considered the immediate freehold to be merged in the remainder for life, then would the action of waste have lain *as a matter of course*, and not in consequence of *any peculiar principle*:

2. Because the resolution in Lewis Bowles's case impliedly coincides with, and confirms the passage in Coke (*c*):

3. Because it is conceived, that Mr. Preston's opinion is at variance with the fundamental principle which he himself lays down, and which cannot be denied; that the doctrine of merger universally requires that the estate in reversion shall in

(*a*) *Ibid.* 218 b. n. 2.
(*b*) 3 Prest. Conv. 230.
(*c*) See and consider 11 Rep. 84.

legal acceptation be sufficiently large to comprise the estate which is merged. (*a*) The mathematical absurdities which the law has avoided by the maxim *omne majus continet in se minus*, and the converse maxim, would be fallen into, if one estate could comprise another which is in every respect its equal.

Effect of the remainder being of the same extent with the particular estate in the same person.

If, however, the estate for life and remainder in the same person, be not only equal but of the same identical extent in point of ownership, the latter must be rejected as an useless addition; as if there be a lease to A for life, remainder to A for life, or (to take a less obviously absurd case) if there be a gift to a man and woman and the heirs of the body of the man, with remainder to the man and woman and the heirs of their two bodies, this remainder in special tail is a nullity; because it must necessarily expire with the former general estate tail. (*b*)

Cases further illustrating the application of the doctrine of merger to estates in one conveyance.

But an estate for life, properly so called, is greater than an estate *pur auter vie* (*c*); and therefore if a lease be made for the term of another's life, remainder to lessee for his own life, the particular estate merges in the remainder. (*d*)

It may, however, be inferred from a position of Lord Coke, grounded on the principle, that one chattel cannot merge another, that if one make a lease to A for ten years, remainder to him for twenty years, he will have the latter added to the former term, and an estate for thirty years. (*e*)

(*a*) 3 Conv. 228.
(*b*) 1 Inst. 28 b.
(*c*) 1 Inst. 42 a.
(*d*) 11 Rep. 84. Owen, 38.
(*e*) 1 Inst. 273. But it is now settled, that, by means of a *surrender*, an antecedent may merge in a subsequent term, though the latter be for a less number of years. *Hughes* v.

It is observable that though a *remainder* cannot, *as such*, become merged, yet it may in its relation to a subsequent estate, as in a lease to A for life, remainder to B for life, remainder to B in tail: for its being a remainder gives it no exemption from merger; that exemption depending merely on the priority or posteriority of the limitation.

From these important distinctions we may deduce this general result as peculiarly referrible to the doctrine of remainders, that a remainder is never *avoided* but only *accelerated* by the merger of the particular estate, because the extinguishment of that estate is after its legal creation.

No tenure between particular tenant and remainder-man.

XII. *There is not any tenure between the tenant of the particular estate and the remainder-man, as there is between him and the reversioner;* whence a grant of the remainder does not, like the grant of a reversion (*a*), carry any of the fruits of seignory, as rent, &c. (*b*)

Term remainder not requisite to its creation.

XIII. *The term remainder is not requisite to the creation of a remainder, even in assurances at common law.* (*c*) The true test of its existence is the applicability of the several rules above discussed, the most prominent and obvious of which is its postponement to a prior estate in the land.

Thus if lands be given to one and the heirs male of his body, and to him and the heirs female of his body, this limitation to the heirs female is a

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Robotham, Cro. Eliz. 302. *Stephens* v. *Bridges*, V. C. 1821, cited Sugden's Vend. 382. 6th edit.

(*a*) Co. Litt. 143 a.

(*b*) Vide Cro. Eliz. 321. 1 And. 23.

(*c*) Roll. Abr. 416. 1 Brook, 523. Plowd. 29. 134. 157 b. 159. 170 b. 542 a. Dyer, 125 b. 1 Roll. Rep. 319.

remainder, because it is not to take place until the estate of the heirs male is spent. (*a*)

And on the other hand, the *word remainder* is of no force in the creation of a remainder when any of the ingredients to its substance are wanting (*b*); as if it be declared that upon the determination of the particular estate the lands shall *remain* to the grantor, it is not a remainder but a reversion. (*c*) So that in instruments in which remainders are formally created, it is not usual to mention the word *remainder*, but to introduce them by words expressive of the natural determination of the preceding estate.

In what a remainder may be limited.

XIV. The above definition of a remainder by Lord Coke (*d*), does, in strictness, apply only to *land*, and such incorporeal hereditaments as savour of the *realty*. But the word *tenement* is inaccurately used by his lordship; for expectant limitations in *offices*, &c. of a strictly personal nature, may enure as remainders. (*e*) If indeed there be a grant of an *annuity* (*f*) by such words as would create an estate tail in lands or tenements, the ulterior limitation is void; because annuities (31)

(31) It may be proper to mention that Ld. Chancellor Loughborough, in pronouncing judgment in the case of *Turner* v. *Turner*, 1 Bro. C. C. 325., was led to an observation, which, if taken abstractedly from the context, would militate against this doctrine. His lordship was addressing himself to the validity

(*a*) Co. Litt. 377 a.

(*b*) Cro. Eliz. 727. 765. 792. Moor, pl. 795.

(*c*) Co. Litt. 299. Raym. 142.

(*d*) Supra, 24.

(*e*) 9 Co. 48. And. pl. 201.

(*f*) The same proposition may be stated of an *office* merely relating to personal chattels. 2 Bl. Com. 113.; but not of offices or dignities concerning lands, or relating to fixed and certain places. 7 Rep. 33.

are not within the statute *de donis* (*a*); and consequently the antecedent limitation carries a fee-simple conditional. But a remainder may be limited in an annuity after any estate less than an estate of inheritance. (*b*)

Annuities not within the statute *de donis*.

It is likewise observable that there are some copyholds of inheritance in which the custom of intailing does not exist; and where, by consequence, a limitation to one and the heirs of his body gives a fee-simple conditional (*c*); and in these, as in annuities, a remainder cannot be limited upon any estate of inheritance.

Copyholds of inheritance sometimes not intailable.

But here again a distinction of practical importance may be deduced from principle. The limitation after the fee in an annuity is in all cases void at law; for if it be a limitation at common

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of a limitation in an annuity, which was preceded by an estate of inheritance therein, and which, therefore, he very properly considered void as a remainder; but, according to the language of the report, the reason which is given for its invalidity as such is, that there can be no remainder of property which is not within the statute *de donis*. If this proposition were true, the inquiry in the present section would be reducible to a very narrow compass; but it most unquestionably ought to have been restrained to remainders limited after estates of inheritance, and probably this was all his lordship meant, as the nature of the case called for nothing more.

(*a*) Co. Litt. 19, 20.

(*b*) Vide 9 Co. 48. And pl. 201., from which the inference in the text is analogically drawn.

(*c*) Formerly this point was much doubted. Co. Cop. 53. Cro. Car. 42. *Rowden* v. *Malster*. Coke says copyholds are intailable by custom only. 1 Inst. 60 b. 3 Rep. 8 b. But Holt, in *Adams* v. *Hincloe*, 11 Mod. 199., held the statute *de donis* universally operative. But Ld. Coke's doctrine was recognised in *Doe* v. *Clarke*. 5 Bar. & Ald. 478.

law, it is void for the reason above given; and if it be by way of use, then it is void, because annuities are not within the statute of uses. (*a*) But although, therefore, it is a nullity at law, yet it may in this last case be clearly good as an executory trust, if to take effect within the boundaries set up against perpetuities.

But although there are manors in which an entail cannot be created (*b*), because the custom has not given the statute *de donis* the operation which it did not arrogate of itself; yet the executory limitations which were introduced into real property by the statute of uses, are, without the sanction of custom, valid in surrenders of copyholds; for according to the authorities a fee may certainly be mounted on a fee in copyhold estates (*c*), subject only to the same rules as govern other executory limitations.

How executory limitations in copyholds enure.

Though, however, these future limitations in copyholds do not differ widely from contingent remainders in copyholds in their liabilities, both being equally exempt from destruction by any act of the antecedent taker; and though they have sometimes received the title of remainders; yet it must be allowed they seem supportable only as future uses. But the admission of them, coexisting with an affirmed non-application of the statute of uses to copyholds, has been supposed

(*a*) Gilb. Uses, 281. Jones, 127.

(*b*) *Pullen* v. *Middleton*, 9 Mod. 484. But this doctrine is combated in Watk. Cop. 153.

(*c*) *Edwards* v. *Hammond*, 3 Lev. 132. *Brian* v. *Cawsen*, 3 Leon. 115. Cro. Eliz. 361. *Bentley* v. *Delamor*, 1 Freem. 267, 268. Carth. Read. 31, 32. *Taylor* v. *Taylor*, 1 Atk. 386.

an inexplicable anomaly; yet I beg to suggest whether the inconsistency is not merely in the terms of the proposition. For if there be a surrender to A to the use of B and his heirs till an event, and then to the use of C and his heirs, the whole legal fee is in A, and the limitation to C will enure as a shifting trust, inasmuch as there is a moulding of the mere equitable interest, because the whole legal estate is in A (*a*), consequently the limitations we are adverting to arise only when the use is declared upon the seisin of the lord. Now the lord has the freehold, and when the copyhold is yielded up to him, he is but a trustee for the grantee, who is sometimes, though, it is conceived, improperly, called the surrenderee; for it is manifest that the lord is the real surrenderee, and that the beneficial taker is therefore (what he is usually designated) (*b*) a mere *cestui que use*. Now when there are several *cestui que uses* named in the surrender, and as in the case under consideration, the admission of the first *cestui que use* does not, from the nature of the limitation, vest any estate or interest in the subsequent *cestui que use* under the doctrines of the common law, there seems no impediment to suffering the ulterior use to be served by the seisin of the lord, like a future use in a freehold estate. If it be asked why, if this doctrine be allowed, the admittance by the lord is not in every case dispensed with, I answer that it is perfectly consistent with what the law has done in many other

(*a*) *Rowden* v. *Malster*, Cro. Car. 44.

(*b*) Vide 2 Bl. Com. 366.

cases, to admit the statute in the one instance, and reject it in the other. For there are many cases in which a limitation of use in freehold hereditaments does not bring in the statute, simply because the common law gives the party the entire beneficial interest without it. (*a*) By parity of reasoning, when the operation of the admittance answers the intent of the parties (as when the ulterior limitation is strictly a remainder,) the statute is excluded. But we legitimately infer the propriety of its application when the admittance is inadequate to the proposed object, as when the antecedent use in the surrender carries the whole legal estate; or when, though it does not carry the whole estate, it is infringed by the subsequent limitation, which can therefore enure only as a future use. I know of no arguments deducible from the principles of tenure, or the peculiar situation of lord and tenant, as it stood at the time of passing the statute of uses, which can be urged against the lord having a seisin to serve *a future use* in the copyhold, when it vests; for

1. The lord has without doubt a sufficient seisin within the statute;

2. His agency is merely ministerial and analogous, even before the statute of uses, to the organ or conduit pipe which grantees to uses are converted into by that statute;

3. The analogy of the cases I have alluded to in freehold hereditaments favours the application

(*a*) Vide Bac. Read. 63, 64. *Jenkins* v. *Young*, Cro. Car. 167.

of the statute to limitations, which the admittance of the first taker cannot reach on account of their not being within the rules of the common law, by which surrenders as well as conveyances of freehold estates are construed (*a*);

4. The circumstance of the surrenderor being legal tenant until admittance (*b*) shows that there is nothing in the relation of lord and tenant to prevent the execution of a future use; for as the surrender is an actual grant to the lord, it is plain that something very similar to, and indeed in substance the same with, the operation of the statute of uses, is among the fundamental principles of the doctrine of copyholds.

But whatever obstacle may chance to be raised against the statutable execution of a future use as between lord and tenant, it will certainly be distinct from that which is the ground of excluding its operation as between one copyhold tenant and another.

Conclusions as to executory uses in copyhold surrenders.

The conclusions which seem deducible from this enquiry are,

1. That executory limitations by way of future use (*c*), and (it is from analogy conceived) by way of executory devise, are admissible in copyholds (32), and

(32) This, indeed, it is in vain to controvert. It rests upon a strong foundation of *dicta* and determinations, and their irresistible authority is but feebly opposed by the arguments of Mr. Watkins.

As the reasoning of that writer has been recently contro-

(*a*) Willes Rep. 180.
(*b*) 2 Bl. Com. 368.
(*c*) Vide 4 Co. 23 a.

2dly. That they confer, when they vest, an ownership to the legal estate; or,

3dly. That if the ulterior *cestuique* use has not a complete title by force of the limitation, yet there can now be no doubt but that he acquires it by admittance *at that period*, which therefore, in the uncertainty which at present surrounds the point, is always advisable in practice. These inferences are equally applicable to every species of future use, however arising, whether through the medium of a power, or from that sort of act which (for want of a better phrase) we term the act of God. For all of them are merely modes or *media* of a future use (*a*), and it is clear on principle, that if it may arise in one instrument, or under one shape, it may in another, unless where the custom of the manor forms an impediment.

It is extremely desirable that these propositions should be established, on account of the general

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verted, as it is conceived, with success, (See Sanders on Copyhold Surrenders,) I shall no further notice it than to observe, that it seems fallacious on these grounds.—1st, It supposes the whole point to be proved, by shewing the surrender to be a conveyance at common law; whereas, admitting it, on the one hand, to be a common law assurance, we must, on the other, concede the modifying or controlling power of the general custom of manors; and therefore an absolute identity of nature in a surrender of copyholds does not follow. But, secondly, admitting the proposition in its fullest extent, it proves nothing, or if any thing the very reverse of Mr. Watkins' doctrine; for if a surrender were precisely identical with a common law conveyance, then might uses be superadded to it.

(*a*) See Mr. Booth's printed opinion at the end of Mr. Hilliard's edition of the Touchstone.

practice of covenanting to surrender copyholds to the same uses to which the freeholds of the settlor have been conveyed, and which have received modifications peculiar to the doctrine of uses.

But to return to remainders.

Subject to the above observations, it seems that a remainder may be created in any freehold or copyhold hereditament; and, as it is now established, in a rent charge created *de novo* (*a*); though this was once doubted on the ground that when once a rent *de novo* is granted for any particular interest it is the whole rent, and consequently there is no remainder to limit over. (*b*) But as this doubt no longer exists, this case is an exception to the proposition, which is stated as *universally* true in the books, that when the particular estate is created, there be a remnant of an estate left in the donor to be given by way of remainder. (*c*)

Rents *de novo*.

And estates for life, or *pur auter vie* admit of modifications strictly under the doctrine of remainders; and the same rules which are used to distinguish remainders from future uses and executory devises in inheritable freeholds, are the *criteria* by which the limitations of estates *pur auter vie* must be tried.

Estates for life.

But a *termor* cannot create a life estate in his term with a limitation over (*d*), except by devise (*e*) or deed of trust (*f*), and then such limitation is not a remainder, or the legal estate; because a

Terms.

(*a*) 1 Lev. 144. 1 Sid. 285. 2 Keb. 29.
(*b*) Plowd. 35 a. 1 Brook, 252. pl. 8. 254. pl. 54. 58.
(*c*) Noy's Max. 73.
(*d*) 6 Cruise Dig. 433.
(*e*) *Manning*'s case, 8 Rep. 95.
(*f*) 1 Vern. 235.

life estate in a term being indeterminate is a *quasi* freehold, and consequently the whole estate therein.

But it is now settled, that such a limitation of a term after a life estate therein is good by way of executory devise (*a*) or trust (*b*); if it does not violate the limits of a perpetuity, which are the same both in real and personal property. (*c*)

But as in asserting that chattels real are capable at all of bearing a limitation by way of remainder, in the strict and proper sense of that word, I am advancing a position which is contrary to that of a very learned and able writer, it is necessary here to examine the grounds of the doctrine.

Mr. Butler, including both chattels real and chattels personal under personal property, says, that every future bequest of it is executory, and that a remainder can only be limited in freehold estates; and the language of Mr. Fearne, though not so strongly expressed, is to the same effect. (*d*)

Whether a remainder can be created in chattels real.

But, it is believed, there is no case in which chattels real have been held absolutely incapable of a remainder. In all the cases in which the future limitation of a term has been held executory, there has been a prior devise of it for life, and by consequence a *specific* reason for that construction. It would have have been nugatory in the Courts to have said, that no legal interest in a term can be given over after a devise to a person for life, *because* an *estate for life* was of

(*a*) 8 Rep. 95.
(*b*) 1 Burr, 284. 1 Vern. 100.
(*c*) *Long* v. *Blackhall*, 7 T.R. 235.
(*d*) But, Fearne, C. R. 401.

greater estimation in the eye of the law than the longest term of years, and *because* the possibility of a term's continuing longer than the *life* of the first limitee was not such an interest as could be given over (*a*); if *every* ulterior disposition of a term were executory. And it is deducible from the case of *Welcden* v. *Elkington* (*b*), that if a termor carve out a less estate, and give over the residue of the term by way of remainder, the ultimate limitation is a proper remainder. And in a recent case (*c*), the point was impliedly determined; for a devise of leaseholds to J. S. on his attaining twenty-one, with words conferring a constructive estate in trustees in the mean time, was held to be a *remainder vested for all purposes.* (*d*) In this case no doubt was suggested either by the bar or the bench, of the capacity of leaseholds for a settlement by way of remainder.

And the case of *Wright* dem. *Plowden* v. *Cartwright* (*e*), is an authority for the same conclusion; for in that case, by a common law assurance, the remainder of a term was given over and held good.

This point is of the greatest importance, because no ulterior limitation of the residue of a term can ever confer a legal estate if the doctrine of remainders be exclusively applicable to freeholds. And in addition to the argument against the admission of that idea, drawn from the increased

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(*a*) See 1 Raym. 325.
(*b*) Plowd. 519, 520.
(*c*) *Revell* v. *Parker*, 1 Maul. & Sel. 692.
(*d*) *Ibid.* 695.
(*e*) 1 Burr. 282.

stability of terms of years in later times, there is a powerful argument *ab inconvenienti* in the vast abundance of property which is embraced by long leases. (33)

Conclusion from the enquiry.

Hence then we conclude, that a minor derivative term may be carved out of the original term, and the residue disposed of by way of remainder (*a*); and, therefore, a remainder may be limited after an estate in the term, which is, in *substance* and *effect*, for life; as if a termor for one thousand years grant to A. for ninety-nine years if he so long live, remainder over. This observation, if well founded, suggests a form which may be advantageously adopted by those who wish to confer a legal and transferable interest on an ulterior taker of a term; for while the subsequent estate acquires a communicable quality at law, it seems not more liable to destruction than an executory limitation. Following up the principle, we may conclude that a remainder in a term may in some cases be limited after a contingent limitation, (*b*) which would, if

The principle traced to practical consequences.

(33) "Many men," Lord Nottingham has observed, (see Swanst. Rep. 462.) "have no other estates but what consist in leases for years; and therefore it were not only hard, but very absurd, to disable the owner of such an estate to provide for the contingencies of his family." And see observations to the same effect by Lord Mansfield. 1 Bur. 284.

(*a*) 2 Prest. Abstr. 119. 3 v. 153.

(*b*) *In Duke of Norfolk's* case, 3 Cha. ca. 1. 2 Cha. R. 119. Pollexf. 223., it was said that a lease for years, which was but a chattel, would not *bear* a *contingent* limitation, on account of its meanness, but as to this point, Ld. Nottingham replied, the difference between a chattel and an inheritance was a difference only in words, and not in reason; and his lordship's decree was finally established in the Lords. Journ. v. 14. p. 49.

vested, confer the absolute interest of the term. Thus, if a leasehold estate be granted to A for ninety-nine years, if he so long live, remainder to his first son unborn for life, and if A dies without leaving issue male then over, the ultimate limitation seems to enure by way of contingent remainder; (34) for if the estate of A had been for life, or a *quasi* freehold, such ultimate limitation would, in a will or deed of trust, have been good as an executory devise or shifting trust, and not have been invalidated by the intervening limitation to the issue of A, because it is to take effect in the event of the failure of that limitation, as in the case of a limitation in freehold hereditaments preceded by the fee. (*a*) Hence, therefore, when the estate of A is *not* for *life* but for *years only*, so that an interest *immediately* expectant thereon might be a remainder, it follows that, notwithstanding the interposed contingent limitation to the issue, the ultimate limitation may be a remainder. But from the exact analogy which this case bears to the limitation of an estate after a contingent limitation of a collateral fee, it may likewise be inferred, that such ultimate limitation of the term is contingent. It is believed, however, that there is no difference in leasehold estates between a contingent limitation enuring strictly by way of

(34) The reader will, of course, observe, that this case states the limitation to be to an *unborn* son; otherwise it would be identical with *Cotton* v. *Heath*, 1 Roll. Abr. 612. pl. 3. 1 Eq. Abr. 191. pl. 2., and the ultimate limitation, therefore, capable of enuring only as an executory devise or trust.

(*a*) *Vide supra*, 27.

remainder, and an executory limitation (*a*), so far as respects their qualities and capacities. (35)

This section may be concluded with observing, that nothing which has been said of the capacity of a term of years for modification, applies to the *trust* of a term *attendant on the inheritance;* for *that*, in the consideration of equity, is merged in and identified with the freehold, and therefore possesses the same properties. (*b*) But the trust of a term in gross has no peculiar capacity for limitation. (*c*) As to the legal estate of the trustee; whether in freehold or chattel hereditaments, it has the same capacity for settlement by way of remainder, (36) as when clothed with the beneficial interest.

XV. Upon the whole then, the accurate definition of a remainder seems to be,

An estate in lands, hereditaments, or chattels real (*d*), limited to one who may take a new estate therein (*e*), on the natural determination of a par-

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(35) Long terms of years are now so frequently created, and so frequently the subject of family settlements, that an examination of the modifications of which they are susceptible by a competent inquirer would be a desirable performance.

(36) As at length, after much fluctuation of opinion, it seems to be settled, that the general words in the will of a trustee do not pass estates held in trust when there are complicated limitations, they are not so liable as formerly to inadvertent entanglements. Vid. 8 Ves. 417. 8 T. R. 118.

(*a*) Being equally out of the power of the prior taker, they must be equally within the rule against perpetuities.

(*b*) By the three Chief Justices, 2 Ch. Rep. 233.

(*c*) *Per* Ld. Nottingham, *ibid.* 235. *Howard* v. *Duke of Norfolk.*

(*d*) *Vide supra*, Sect. XIV.

(*e*) *Vide supra*, Sect. X.

ticular estate (*a*) in the same subject matter (*b*); created either in fact, or in contemplation of law, together with such particular estate (*c*); and forming, to certain purposes, but one estate therewith. (*d*)

(*a*) *Vide supra*, Sect. VI.
(*b*) *Vide supra*, Sect. IV.
(*c*) *Vide supra*, Sect. III.
(*d*) *Vide supra*, Sect. VII.

CHAPTER II.

VESTED REMAINDERS.

SECTION I.

The Criterion of a Vested Remainder examined and explained.

Primary division of remainders.

THE primary division of remainders is into *vested* and *contingent:* the former will be the subject of this chapter; and in treating of them we will consider 1st, their criterion; 2dly, the manner in which they are transferred; and 3dly, the means by which they may be destroyed. The criterion of a vested remainder will therefore be the subject of this section.

A vested remainder may be defined to be a remainder which is simply limited to take effect upon the determination of the particular estate.

Vested remainder not necessarily indestructible.

Sir William Blackstone appears to have inconsiderately annexed to it the idea of indestructibility (*a*); but the least reflection evinces that it is often dubious whether a vested remainder will ever take effect in possession; as when, for instance, it is limited upon an estate tail, or when it is a remainder in tail or for life; in which case it may fail by the death, or death without issue, of the person entitled to the remainder during the con-

(*a*) 2 Com. 169.

tinuance of the particular estate. And accordingly, however uncertain or improbable may be the actual taking effect in possession of the remainder, it is vested, if it be ready to do so, on an immediate determination of the particular estate. Therefore a remainder to A during the life of tenant for life is vested (*a*); for although it is not to take effect on every possible determination of the particular estate, because it must so take effect, if at all, during the life of the particular tenant; yet its present capacity exists; for the particular estate may determine during A's life by forfeiture, and then his remainder comes into possession.

Upon this principle, and in this manner, remainders are limited to trustees to bar dower; and the sole utility of those limitations is derived from their vestedness.

Before we enquire what remainders are vested it may be proper to state that it is a fundamental principle of construction, that the Court never construes a remainder to be contingent when it can be taken for vested (*b*); for which two reasons are usually given, 1st, that contingent remainders are liable to be destroyed; and 2dly, that keeping the remainder contingent until the particular estate determined would, in many instances, exclude the issue of a person intended to take in

Remainder construed to be vested if possible.

(*a*) *Berrington* v. *Parkhurst*, 3 Atk. 135. Willes Rep. 327.; confirmed on a writ of error to the Lords, 6 Bro. Parl. ca. 352.

(*b*) *Per* Ld. Hardwicke, in *Ives* v. *Legge*, according to the note of that case in 3 T. Rep. 489. In the language of Ld. Coke, 2 Bulst. 131., "contingencies are odious in the law, and are the causes of troubles, whereas the vesting of them is the cause of repose and certainty."

tail by the parents dying before the remainder became vested. (*a*) It is conceived that the public benefit which is derived from vested remainders being a grantable species of property, is a still more adequate motive for the adoption of this rule.

Remainder subject to a power of appointment.

A remainder after a power of appointment, as to the use of A for life, remainder to such uses (whether general or special) as A shall appoint, remainder to B, is likewise vested; though formerly (*b*) an opinion prevailed that the remainder was contingent if the words introducing it were "*in* "*default of*" appointment, instead of "*in default* "*of and until*" appointment (*c*) (1): but it is now established that a limitation in default of appointment is invariably vested, though liable to be

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(1) While this idea existed, it appears to have been thought, (see the argument of counsel in *Cunningham* v. *Moody*, 1 Ves. 174.) that the fee was in abeyance, but that conclusion would not have been a necessary or even legitimate result of its admission; for if the limitation in default of appointment was contingent, the inheritance of the use continues in the grantor, in this as well as in the other cases, when it is not actually transferred to, and vested in a stranger, by consideration or declaration of use. This point is still important, for it may happen that the limitation, in default of appointment, may be inadvertently omitted: in that case, it is apprehended, the fee would unquestionably result.

(*a*) *Per* Buller J., in *Doe* v. *Perryn*, 3 T. Rep. 494. And *per* Bayley J., in *Driver* v. *Frank*, 3 Maule & Selw. 37.

(*b*) Vide 2 Cas. and Opinions, 30. Mr. Booth's opinion. See also *Leonard Lovie's* case, 10 Co. 78. *Clere's* case, 6 Co. 68.

(*c*) All the gentlemen, (except Mr. Booth) whose opinions are published, 2 Cas. & Op. 29 to 33, treated the remainder subject to the power as contingent, notwithstanding the words '*and until*.' Mr. Booth's only is deserving attention.

devested by the execution of the power. (*a*) But as the appointment operates by interposing new uses between the particular estate and the remainder; and as when it is executed it is exactly the same as if those uses had been created in the conveyance containing the power, it is manifest that an appointment does not necessarily devest the subsequent limitation, but only where the uses raised by the appointment are such as would have rendered it contingent or altogether void, if they had been originally declared. If, for example, any use *less than the fee* be created by the appointment, the ulterior limitation is *postponed* but not *devested;* if that use *amounts to the fee, but is contingent,* then the limitation in default of appointment may be devested and rendered *contingent* (*b*); but if the new intervening use *amounts to the fee and is vested,* the subsequent limitation in default of appointment is not merely devested, but extinguished and gone. (*c*) These consequences manifestly flow from the principles laid down in a former page.

A proposition of Mr. Fearne's considered.

Deducing his inference, without doubt, from cases and reasonings like these, Mr. Fearne lays it down, that the present capacity of taking effect in possession, if the possession were to become vacant, *universally* distinguishes a vested remainder from

(*a*) *Cunningham* v. *Moody*, 1 Ves. sen. 174. *Doe* v. *Martin*, 4 Durn. & East, p. 39., confirmed by the opinions first of Sir Wm. Grant, and afterwards of Lord Eldon, in *Maundrell* v. *Maundrell*, 7 Ves. jun. 567. 583. 10 Ves. jun. 246. And in the case of *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 131. the late Master of the Rolls assumed the point to be set at rest. See also 3 Ves. 661. 13 Ves. 246.

(*b*) *Vide supra*, 27.

(*c*) *Supra*, 25—27.

one that is contingent. (*a*) I cannot, however, reconcile many very important parts of the doctrine with that proposition. Many instances may be given in which, it should seem, the remainder is vested, *without* a present capacity for taking effect in possession if the particular estate were to determine immediately.

Vested remainders in copyholds after an estate for life at once subvert the proposition as an universal one; for these cannot take effect on any other determination of the particular estate, than the death of the tenant for life. (*b*)

So when a remainder is expressly referred to a future period, in which case if the particular estate were by any means (as by forfeiture) to terminate before the time arrives at which the remainder is directed to take effect, it could surely not come into possession against the intention of the parties, and the express language of the instrument. And in Boraston's case (*c*), which leads this doctrine, a limitation to A *when he attains a particular age*, is distinctly said to mark the time at which the remainder is to vest in possession; and indeed, in general cases, *that* is not only the manifest intent but the only contemplated object, as the particular estate is for the most part limited to a trustee during the minority of the beneficial taker. It is true, however, that the Court in Boraston's case compared the limitation to a remainder *after the expiration of a term*,

Observations on Boraston's case.

(*a*) Cont. Rem. 216.
(*b*) 9 Co. 107. *Margaret Podger's* case. 1 Saund. 151. 2 Brownl. 154.
(*c*) 3 Rep. 19.

but, it is apprehended with some inaccuracy. For the books take a distinction between the words *term* and *time* (*a*), and the following propositions are most important corollaries from that distinction, viz. that if a remainder be limited from and after the determination of a term it shall vest in possession whenever the particular estate determines, because the word *term* denotes the interest of the tenant, as well as the given number of years. But that if a remainder be limited from and after the given number of years, or time at which the term expires, then it cannot come into possession before the arrival of the appointed period. (2) Now the latter of these cases, which, however verbal and refined the distinction may be deemed, seems to be law (*b*), is that to which the present case is demonstrably referrible; and therefore, admitting the soundness of the *decision* in Boraston's case, the *reasoning* does not appear accurately derived from that case which furnishes the proper analogy.

Difficulties attending vested remainders which cannot commence in possession till a *future period.*

But suppose the particular estate in the trustees or executors, by reason of forfeiture, &c. does *not* continue until the beneficial devisee comes of age; and suppose the remainder has no present capacity for taking effect in possession, can it *then* be a

(2) Note, that though these propositions may be deducible from the distinction in Coke, this is not exactly the illustration of it which he gives, which is not that of a *remainder* but of a *future term.* 1 Inst. 46.

(*a*) Co. Litt. 45.

(*b*) Admitting the decision in *Wright* v. *Cartwright*, 1 Burr. 282. to be law, it does not militate with the propositions in the text.

vested remainder? Such a determination of the preceding estate presents that *intervallum* which the counsel for the plaintiff in Boraston's case endeavoured to inforce, affirming broadly that *when a particular estate may determine before the remainder the remainder does not vest* (*a*): a proposition, however, which though weighty in its application to the case at bar, and though adopted by Rolle (*b*), is not tenable. Under the circumstances adverted to, the *remainder* is *devested*, though the *interest* of the devisee continues; and *ex necessitate*, it should seem, the future limitation is converted into an *executory devise*. And with this conclusion agree the *quære* of Gilbert, and the general spirit of the doctrine laid down by Manwood Chief Baron in Lord Paget's case. (*c*) I am, however, aware that it militates with the rule, that when once a limitation has taken effect in a remainder, it shall never after enure as a future use or executory devise. Yet if the particular estate be destroyed or turned to a right of action, and there is no present right of entry in the remainder-man, we have then a future limitation without any particular estate, and surely it must operate in the manner ascribed to it, or else be a nullity. If we follow up the consequences which naturally flow from its being a vested remainder, viz. that a right of entry arises immediately on the forfeiture of the particular estate, then (to use Mr. Fearne's remark on a similar limitation, but with reference to another point) we pay no regard, and allow no sort of

(*a*) 3 Co. 20.
(*b*) 2 Abr. 419.
(*c*) *Vide supra*, 39. Bac. Abr. Rem. (G.)

effect to the words when he attains twenty-one years. (*a*)

Limitations dependent on adverbs of time.

The great importance of this species of limitations, dependent on adverbs of time, induce me to avail myself of its not being irrelevant to the subject of this section.

These limitations are among the most common that practice presents, and yet the doctrine which governs them appears to have advanced but little towards a firm and consistent foundation. In the first place, it is clearly settled in courts of law, that notwithstanding a devise to trustees and their heirs during the minority of the beneficial devisee, the trustees may take a chattel interest; and the ground of this decision is, beyond doubt, abstractedly an adequate one, viz. that the trust does not require an estate of a higher quality, and by such a construction the subsequent limitation becomes vested in interest. But when we reflect that the courts of law avow a total ignorance of trusts, we cannot but imagine that case a glaring discrepancy, in which not only the existence of trusts is recognised and acted on, but of sufficient consideration to weigh down the words of legal limitation, to expunge the very language of the instrument, and render the estate devolvable as a chattel on the executors, which is upon every other principle a fee, and which is expressly directed to descend to the heirs. (*b*)

(*a*) Posthumous works, 191.

(*b*) Ld. Keeper Henley was impressed with this idea in *Wright* v. *Pearson*, (1 Eden, 119.) a case of the kind we are speaking of, observing, "the testator intended that the devisee and *his heirs* should execute the trust: can the Court say no,—*We* will transfer it to the *executors*?"

But however desirable may be a perfect accordance of adjudications with principles in an artificial system like that of the real property of England, it is of far less import than the steady adoption of some certain rules by which the conveyancer may readily know the measure and quality of estates, and avoid the perplexity and embarrassment in which titles are frequently involved, from those erroneous conclusions, which result solely from the precarious duration of the premises on which he bottoms his reasoning. And as the construction which enables an ulterior limitation to vest is, politically considered, the most beneficial to the community, by accelerating the circulation of property, the judicial determinations which are founded on that construction, though with a sacrifice of principle, will be lamented only by the speculative, not by the practical lawyer, if they enable him at length to predicate with certainty, that a devise to trustees *and their heirs* until A shall attain twenty-one, and when he shall attain twenty-one, then to him, &c., or then the lands to be conveyed or transferred to him, or (which seems the same thing) upon trust to convey or transfer to him (*a*), creates a remainder which vests immediately, and takes effect in possession when A shall attain twenty-one.

The most considerable and most recent of the authorities appear to warrant this inference. (*b*)

(*a*) Vide *Doe* dem. *Player* v. *Nicholls*, 1 Bar. & Cresw. 336.; but in this case the devise was not to the trustees and their heirs.

(*b*) *Goodtitle* v. *Whitby*, 1 Burr. 222. *Doe* v. *Lea*, 3 T. Rep. 41. *Stanley* v. *Stanley*, 16 Vez. 491.: in these cases the devise was to the

Nothing, however, can completely justify them but the paramount claim which the intention of testators has to the regard of the courts: and it is impossible to apply the same proposition to *conveyances*, without extirpating the most rooted principles of our system of property.

Observations on the case of Warter v. Hutchinson.

But in devises, if the recent case of *Warter* v. *Hutchinson*, (*a*) be a valid authority to the extent of the position which is derivable from it (3), it should seem that we may go farther than the inference stated, and treat the estate of the trustees as a chattel interest when the intention of the testator appears to require that construction, notwithstanding an express trust for sale succeeds the limitation of their estate.

Mr. Sanders has thought that this case breaks in upon the uniform tenor of prior decisions, in regard to the effect of a trust for sale annexed to the legal estate, which has always been considered in a will to carry the fee; and the only mode in which he can account for the opinion of the judges

(3) So far as is material to the present point the will was as follows. After directing payment of his debts, testator devised his lands, charged with annuities, to trustees, their heirs and assigns, until T. W. attain twenty-one; and if he should die in the mean time, with similar limitations; upon the trusts thereinafter declared concerning the same, that is to say, upon trust among other things to raise out of the rents and profits of the premises, or by sale or mortgage thereof, &c.

trustees and their heirs; but their estate was held to be only a chattel, merely filling up the measure of time until the devisee beneficially entitled should vest in possession.

(*a*) 1 Barn. & Cresw. 721. See same case under the name of *Warter* v. *Warter*, 2 Brod. & Bing. 349., decided in the same way, by C. P.

is by conceiving that they construed the trust as a mere power of sale. (*a*) And the writer has, at a prior period, expressed an acquiescence with this observation (*b*); but on further reflection he is induced to think, that the trust for sale, looked at strictly as such, did not *necessarily* vary the construction which the case received.

The much lamented custom (4) of the courts of law, in not assigning reasons for their certificated judgments, precludes certainty; but perhaps the most probable ground of this determination was the incorporation of the trust with the antecedent limitation, by reading it as a continuation of the same sentence, in which view it is distinguishable from the prior cases. For it is apprehended, that in none of them the will could have been so read as, when stripped of superfluous matter, to reduce itself to a devise to trustees, &c., during the minority of the beneficial taker upon trust to sell, &c. The will in *Warter* v. *Hutchinson* seems to bear this construction; and if so, and the prior limitation produced an ascertained effect, the conclusion was just. (*c*) But the quantum of the

(4) Lord Mansfield endeavoured to subvert it.

(*a*) 1 Sand. Uses, 258.

(*b*) Essay on Uses, 60.

(*c*) *Glover* v. *Monckton*, 3 Bingh. 13. (C. P. 1825.) seems to shew, that the Courts will not extend the authority of *Warter* v. *Hutchinson* beyond its peculiar circumstances. This case, which was analogous to, though not so strong as, *Bagshaw* v. *Spencer*, was, in regard to the present point, determined in the same manner, viz. that the trustees took the legal fee. *Bagshaw* v. *Spencer*, 1 Ves. 142. 1 Col. Jur. 378.; and *Wright* v. *Pearson*, *supra*, 105. (And Fearne C. R. 187.) are still, therefore, the leading authorities, though the principle they establish *may* yield to the particular frame of the devise and intention of the testator.

money to be raised by the sale, &c., with reference to the value of the property, is surely an admissible means of ascertaining whether the absolute inheritance, or only a partial interest, was intended to pass to the trustees.

No difference in respect to what.

It has been held, and it appears to be now established, that there is no difference in respect to the vestedness of a devise when he attains a particular age, whether it have an antecedent limitation or not. (*a*) But if the future original devise be a *vested remainder*, the prior *implied* estate must be a *chattel* interest; for if the *latter* were a *resulting use*, it would to all purposes of ownership be immaterial whether the *former* were *vested* or *contingent;* because it would enure by way of future use or executory devise, and would not therefore be transferable. For the prior estate would then be the old unaffected fee, and therefore a limitation subsequent to it could be nothing more than an executory right; although if the event upon which it is made dependent be such as must certainly happen, such executory right may properly enough be called vested. When, therefore, that great lawyer Lord Ellenborough affirmed, that *there is no substantial distinction between those cases in which there is, and those in which there is not a prior limitation* (*b*), he must, it should seem, have considered the antecedent implied estate to be a chattel interest. But when

Comments on a *dictum* of Lord Ellenborough.

(*a*) *Doe* v. *Moore*, 14 East, 601.

(*b*) "It appears," says his lordship, in delivering judgment in *Doe* v. *Nowell*, 1 M. & Selw. 327. "whether the devise be in *remainder* or an *immediate* devise, there is no substantial distinction." *Ibid.* 334.

we reflect upon the well-known, general, and long-established rule, that in future devises when no particular estate is expressly created by the will, the fee descends in the mean time(*a*), we must pause before we assent to his lordship's proposition.

Perhaps, however, by recurring to the learning of uses, whence the doctrine of resulting uses was taken, and applied to wills without the slightest alteration of principle, we may take a distinction.

Analogy drawn from the doctrine of uses.

If there be a conveyance to A in fee, to the use of B upon his marriage with C, the inheritance is in the grantor in the mean time. But in a bargain and sale, or covenant to stand seised after a given time, an estate for years is, according to Bacon (*b*), left in the grantor; and this doctrine appears preferable to Ld. Hale's, according to which the intermediate estate is a determinable fee. (*c*) For it may be suspected that Ld. Hale deemed it a *resulting use*, whereas it is in truth entirely at common law, in consequence of the union of the seisin and the use in one individual. (*d*) Now, (it being clearly settled that a devise may be to uses (*e*),) if there be a devise to trustees and their heirs to *the use of A*, when he shall attain twenty-one, the estate in the interim is exactly in the same predicament with the resulting use in the grantor: in the former of these

(*a*) Vide *Clarke* v. *Smith*, 1 Lut. 798. *Pay*'s case, Cro. Eliz. 878., with the observations of Mr. Fearne, C. Rem. 400.

(*b*) Read. 63. *supra*, 76. and n. (*e*) ibid.

(*c*) Vide *Pybus* v. *Mitford*, 1 Ventr. 379.

(*d*) Vide Bac. Read. 63.

(*e*) Vide Co. Litt. 271 b. n. 1. *Ibid.* 290. b. n.

cases it is, therefore, a fee; and consequently the interest of A is valid only as an executory devise, or more properly speaking, as a springing use. But if there be a *direct* devise when, &c. the intervening estate seems exactly similar to the implied term in the bargainor or covenantor. The *inference* is manifest; but even assisted by this reasoning, and qualified by this distinction, which, if we admit the analogy of uses, and the energy of principle, are plausible if not conclusive, it would, I apprehend, be unsafe to rely on the doctrine we have canvassed, and treat a future original limitation as a vested executed estate, in opposition to the general practice and opinions of the profession.

Supposed effect of a substitutive limitation in the case of gifts at a future period controverted.

We may here notice an observation, which has been made by a writer whose opinions are entitled to the greatest regard, that a gift to A and his heirs at his age of twenty-one years, or when he shall attain that age, gives a contingent interest; but that a limitation or substitution, in case he should die under twenty-one, would give to the former limitation the construction and consequent effect of passing a vested interest. (*a*) For the general proposition is cited *Grant*'s case (*b*), and for the qualification of it, *Edwards* v. *Hammond* (*c*), *Doe* v. *Nowell* (*d*), and *Bromfield* v. *Crowder*. (*e*) But this inference does not seem to me to be justly

(*a*) 1 Prest. Abst. 110.
(*b*) 10 Rep. 50.
(*c*) 2 Show. 398. 3 Lev. 132. This case was cited in 1 Bos. & Pull. N. R. 313., and the record produced.
(*d*) 1 M. & Selw. 327.
(*e*) 1 Bos. & Pull. N. Rep. 313.

drawn. It is apprehended, that in no case has such a future limitation been considered vested, in consequence of the substitutive limitation; for how can *that* be a medium of eliciting an intention to vest the antecedent interest, when its whole scope is to provide for a different object of the grantor's bounty?

It is true, that in the last class of cases the limitations were held vested with a liability to be devested, and they could not be *devested* without having been previously *vested;* but to argue that the eventual, adventitious, unfixing was the cause of their original execution into estate, is plainly a *fallacia accidentis.* The interest of the substitutive taker would indeed be totally destroyed, if when the Courts determined the first limitation to be vested, they did not go on and annex to it a liability to be devested in consequence of the limitation over: but *his* interest would be equally consulted if the first limitation were deemed *contingent;* and consequently there must be a pre-existing, anterior, ground for considering it vested. And the Courts seem to have assumed, that the great, if not the only, argument for deeming the limitations we are examining *contingent,* or (which is substantially the same) *executory,* was their quadrating with the doctrine of the Roman law, and that by denying that analogy, the conclusion resulted of course, that they were vested.

The inclination of the Court to vest a future limitation, is in no instance so strongly exemplified, as in those cases in which a remainder in a will to a person, *if* he attain a particular age, has been held vested, liable only to be defeated by

Effect of the condi-

the death of the devisee under that age. (*a*) In order to make this construction it is necessary to regard the particle "if" as creating a condition subsequent.

SECTION II.

Transfer of vested Remainders.

IN treating of the transfer of vested remainders, we shall consider, I. Their capacity for conveyance or transfer by the act of the party. II. Their transfer by act of law, or devolution to the heir.

I. We will regard this first branch of our subject,

1. With reference to the manner of transferring a remainder.

2. With reference to the subject matter of the transfer.

3. With reference to pleading the assurance.

4. With reference to copyholds.

1. The first of these divisions may be subdivided into conveyances by matters in fait, and conveyances by matters of record.

1st, then, *as to conveyances by matters in fait.*

Vested remainders may be the subject of a conveyance, because they are actual estates; but as they

Remainder not transferable without deed.

(*a*) *Stocker* v. *Edwards*, 2 Show. 398. *Edwards* v. *Hammond*. *Bromfield* v. *Crowder*, *supra*, p. 111.

are incorporeal hereditaments, they lie in grant: they are not, therefore, nor were they at the common law, transferable without deed. (*a*) Blackstone, however, in his elaborate and beautiful description of an incorporeal hereditament, affirms, that it can only be conveyed by operation of law, by mere verbal grant, either oral or written; which, says he, is a kind of invisible, mental transfer. (*5*) But herein the learned judge drew from the abstract nature of an incorporeal hereditament a *metaphysical* consequence, diametrically opposite to that which the *practical* wisdom of our ancestors had established. For it is *because* of its *invisible substance*, and in order to supply the defect of that symbolical and impressive delivery which *land* is capable of, that the common law requires a solemn instrument to testify its transfer. This is evident from a freehold in land being at common law transferable without writing. And though a conveyance, and even a surrender (*b*), of an estate in possession, must now by a legislative enactment be in writing (*c*), they need not, like the conveyance or surrender of a remainder (*d*), be by deed. (*e*) But assurances of all kinds, from being almost

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(*5*) This proposition is stated of an advowson in gross, but only *exempli gratia*. Vide 2 Comm. p. 22.

(*a*) Perk. s. 61. Dyer, 174. Plowd. 433. Bro. Grant, 104.

(*b*) 2 Wils. 26, 27.

(*c*) Stat. of frauds, 29 Car. 2. c. 3., which renders necessary a deed *or* note in writing.

(*d*) Co. Litt. 338.

(*e*) 1 Saund. Rep. 236 a. (n. 9). The *dictum* of Lord Eldon, 14 Ves. jun. 158, that a lease for life must be by *deed*, is therefore incorrect.

invariably by deed, are commonly denominated deeds.

The word "*grant*" is therefore the *generic* term of conveyance of incorporeal hereditaments; and consequently, when there is a specific modification of the incorporeal ownership, that title yields to the specific denomination. Thus it is conceived to be logically incorrect to call a *lease* of a remainder a *grant*, merely because it must be by deed. Some gentlemen are, however, of a contrary opinion; and, in the instance put, allege that the term *lease* is an impropriety of expression.

Grant a generic term.

From what has been said, follows an important distinction between the effect of a conveyance by tenant for life, and the person in remainder in fee, with or without deed. If they join in a feoffment without deed, the instrument will operate as the surrender of the tenant for life, and the feoffment of him in remainder; because, although the freehold is in the particular tenant, and the feoffment operates on the possession, yet in order to effectuate the intention of the parties, and enable the remainder to pass, it is held that the remainder comes into possession by the instantaneous accession of the estate for life, and that consequently the conveyance of the remainder-man acts on the possession. (*a*) But if they join in a feoffment by *deed*, then as the deed may operate on and transfer the remainder, the assurance will be deemed the

Some important distinctions considered.

(*a*) Vide 1 Co. 76. *Bredon's* case. Hob. 227. 278. 6 Co. 15 a. *Treport's* case. Co. Litt. 302 b. 1 Roll. Abr. 855. pl. 7, 8.

feoffment of the tenant for life, and the grant of him in remainder. (*a*) If in a lease by deed indented, it will be the lease of the tenant for life, and the confirmation of the remainder-man. (*b*)

But if tenant for life, and he in the remainder, join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only. (*c*)

Both remainders and reversions considered as incorporeal hereditaments, had in former times one peculiarity; a *deed alone* was not sufficient to pass them, for the grant required to be perfected by attornment. (*d*) That ceremony was, however, a distinct appendage to the instrument, in no way implicated in its legal operation; and consequently when the statutes of 4 Ann. c. 16. s. 9. and 11 G. 2. c. 19. took away, in general cases, the necessity of attornment, the legal interest of the grantee was perfected without it. And if the instrument possesses those solemnities which constitute a deed, nothing further is required; for though Mr. Fearne thought otherwise (*e*), it is now agreed that the intent of the legislature and the operation of the statute 27 H. 8. c. 16., embrace only things which lie in livery. (*f*)

Effect of the abolition of attornments.

But if the words "bargain and sell" be the operative words of the instrument, it is, according to the old authorities, invalid without enrolment. (*g*)

(*a*) Ibid. & Co. Litt. 251 a. Dyer, 339. 1 Leon. 262.

(*b*) Co. Litt. 302 b.

(*c*) Co. Copyh. 162, 163.

(*d*) Litt. s. 551. 569. 578.

(*e*) Read. on the stat. of Enrolments.

(*f*) Vide 2 Sand. Uses, 39. Sug. Gilb. Uses, 226. n. 2. 1 Evans' Collection of Statutes, 416.

(*g*) *Adams* v. *Steer, et al.* Cro. Jac. 210. Moor, 34. pl. 113. Resolved by two Chief Justices.

But this doctrine no longer prevails. The principle that where a conveyance cannot operate in one form, it shall operate in that which legally effectuates the intention, has of late years been pushed to an immense extent; and it seems to be settled that a *bargain and sale*, void for want of enrolment, may, as well as a *release* (*a*) or *appointment* (*b*) enure as a grant. (*c*) Hence, the cautious practice of inserting in conveyances a great number of the most operative technical words is less necessary than formerly.

Construction of conveyances.

But when a bargain and sale, release, or other assurance, which may have a specific operation upon a vested remainder, is valid, it does not enure by way of grant, nor is it pleadable as such. (*d*) Though, indeed, a recent case has decided, that a conveyance intended to be a bargain and sale, and duly enrolled as such, will be construed to be a grant, if uses are limited therein, which would be void if it were regarded as a bargain and sale. (6)

A vested remainder is within the statute of uses. (*e*) Consequently it may be conveyed by

Vested remainder within the statute of uses.

(6) *Haggerston* v. *Hanbury, et al.* 5 Bar. & Cres. 101. Note, however, that the operative words were *grant*, bargain, and sell. But if the case in Noy, 66, above adverted to, be law, the word *grant* should seem not essential to, though it certainly strengthens this construction.

(*a*) *Goodtitle* v. *Bailey*, Cowp. 597.

(*b*) *Shove* v. *Pincke*, 5 Term Rep. 124.

(*c*) Noy, 66. Sed vide 2 Sand. Uses, 41. Gilb. Uses, 193, 3d edit. But the case in Noy, was subsequent to *Adams* v. *Steer*.

(*d*) *Cooke* v. *Bromehill*, Noy, 66.

(*e*) 27 H. 8. c. 10., remainders are expressed.

lease and release; for the bargain and sale for a year gives the legal estate, or use executed by the statute, and the release has then a proper groundwork to build on. (*a*).

And a lease and release is the usual way of conveying a remainder or reversion, as well as an estate in possession, as it prevents the necessity of proving a particular estate; but corporations should convey a remainder or reversion by grant at common law; because they are not within the statute of uses (*b*), and the validity of their bargains and sales, though resting on an adjudication (*c*), is therefore questionable. (*d*)

Practical remarks on the grant of a remainder.

In granting a remainder (and the same remark applies to a reversion) four prudential observations present themselves to the practitioner; 1st, that if he doubts of the existence of a particular estate, the lands should be granted generally, since in the event of there being a particular estate, such a grant will pass the remainder (*e*); 2dly, if he knows that there is a particular estate, but has not the means of accurately ascertaining and describing it, then he may, instead of the above plan, grant the remainder in the lands without specifying its dependency on any particular antecedent interest; but 3dly, if he is perfectly clear of the mutual relations of the preceding estate and the remainder,

(*a*) See an able, but superfluously elaborate, opinion of Mr. Booth, in Cas. & Opinions, vol. ii. p. 144.

(*b*) Gilb. Uses, 5. Bac. Read. 57.

(*c*) *Holland* v. *Bonis*, 2 Leon. 121. 3 Leon. 175.

(*d*) See the judicious remarks 2 Prest. Con. 254.

(*e*) Plowd. 161. 10 Rep. 107 a. Vaugh. 83. Even in a fine. 43 Edw. 3. 45.

particularity is, perhaps, most proper, as it is most general and formal; but great attention is requisite, as an error in the description of the remainder vitiates the grant of it, by losing the identity of the subject matter; and 4thly, discrimination obviously demands, that a remainder *must* be granted *as such*, when the remainder-man has a particular estate in the same lands, which he does not intend to pass. (*a*)

Conveyances by matter of record.

2d. As *to conveyances by matter of record.* A vested remainder in the Crown, amounting to a freehold, does of course fall within the rule laid down by St. Germyn (*b*); and cannot be passed from it but by matter of record.

But at this day (*c*) the Crown cannot alien a reversion on remainder in fee, (unless when it is within the 39 & 40 Geo. 3. c. 88., & 47 Geo. 3. c. 24.) without an act of parliament.

As to ordinary cases, a vested remainder in fee may be virtually transferred by common recovery without the concurrence of the tenant of the freehold (*d*), because non-tenure is no ground for impeaching the judgment of a court of competent jurisdiction; and that judgment being an estoppel on record, is therefore binding on the recoveree and all who claim under him. (*e*)

(*a*) See 2 Prest. Conv. 463, 464.

(*b*) Doct. & Stud. b. 1. d. 8.

(*c*) See 1 Ann. c. 7. s. 5., and 34 G. 3. c. 75.

(*d*) See *Bennet and others* v. *Wade*, 9 Mod. 314., where the Chancellor treats such a recovery as good, by estoppel. See also *Duke & Smith*'s case, 4 Leon. 238. And *Webb* v. *Nect.* Cro. Eliz. 21.

(*e*) Vide Pig. 123. 10 Mod. 45. Godb. 147. See another explanation of this in the last-cited case. 9 Mod. 314.

Recovery by tenant in tail in remainder without the concurrence of the freeholder.

But such a recovery by tenant in tail works only a personal estoppel, and though good until set aside, may be avoided by his issue, because they claim not through him but *per formam doni* (*a*); and *à fortiori*, therefore, it may be avoided by the persons in remainder or reversion. (*b*) And, therefore, when a tenant in tail cannot procure the tenant of the immediate freehold to join with him, and wishes to make what title he can to a purchaser, he levies a fine and covenants to suffer a recovery when he shall be tenant in tail in possession. And it may be remarked by the way, that no doubts are now entertained of the efficiency of a recovery duly suffered by tenant in tail after a fine with proclamations; for without recurring to the far-fetched idea of a *scintilla* of the estate-tail remaining after the fine (*c*), (which applies as well to the issue as to the original donee) when tenant in tail is vouched, he comes in of all the estates which he ever had in the lands, and consequently of the estate-tail which the fine has turned into a base fee. (*d*)

(*a*) *Ibid.*, and see also Marquis of *Winchester*'s case, 3 Rep. 1. And *Owen* v. *Morgan*, cited 3 Rep. 5., and the language of the Court in *Shelley*'s case, 1 Co. 96.

(*b*) See the language of the Court in Lord *Say and Sele*'s case, 10 Mod. 45. It does not seem settled whether such a recovery is void or voidable against the issue, reversioner, or remainder-man. Mr. Preston thinks it only voidable. See 1 Abst. 421 to 426. The practical difference is material.

(*c*) Vide *Herbert* v. *Binion*, 1 Roll. Rep. 223. Poph. 100. 2 Roll. Abr. 394.

(*d*) Moor, 256. Bro. Ab. tit. Recov. 19. 30. It is generally understood that the *issue* can also suffer a valid recovery after the fine. See 2 Atk. 201. Fearne's Opinions, 442. 5 Cruise Dig. 404. 3d edition.

But a *fine* may be a medium of assuring not only a vested remainder in fee (*a*), but, when it is levied with proclamations, what is in substance an estate tail; that is, a base fee commensurate with the limits of the estate tail, and determinable only by the remainder-man or reversioner. (*b*) And when the tenant in tail has the immediate remainder or reversion in fee in himself, the fine may extinguish the estate tail therein (*c*), and by consequence transfer the absolute inheritance.

Effect of a fine on a remainder in tail.

Although a fine *come ceo* by remainder-man for life has not a tortious operation, it is a forfeiture, because it is a renunciation of the feudal connexion between lord and tenant, and transfers a fee simple by estoppel, which he cannot lawfully make. (*d*) But if he joins with the person having the next immediate estate of inheritance, in levying the fine, he commits no forfeiture; for the law construes it first a grant in respect of one estate, and afterwards a grant in respect of the other. (*e*) But the tenant for life, whether in remainder or not, commits a forfeiture if he joins in a fine *come ceo* with the taker of an estate of inheritance, which is divided from his own by an intervening freehold limitation; and of course the law is the same when the estate of inheritance is in the tenant for life himself. (*f*)

Fine *come ceo* by remainder-man for life.

In the preceding observations we have treated

(*a*) By reason of the estoppel. Vide Touchs. 14.

(*b*) 3 Rep. 84. Jenk. 274.

(*c*) 1 Show. Rep. 370. 4 Mod. 1. 1 Salk. 338.

(*d*) 1 Roll. Abr. 855. pl. 9. 2 Mod. 114.

(*e*) *Bredon*'s case, 1 Rep. 76. 1 Ventr. 160.

(*f*) *Garret* v. *Blizard*, 1 Roll. Abr. 855.

the fine as a *virtual conveyance*, passing a vested interest; but it must be remembered, that although it may be equivalent to a grant of an estate in remainder or reversion by the cognizee to the cognizor, it is void as to strangers I believe, according to the stronger phalanx of conflicting authorities, on account of the want of a freehold estate in possession in either of the parties (*a*), and *hence* it can have no operation by non-claim (*b*), and even an entry by an ulterior remainder-man, or the reversioner, is not necessary to avoid it. (*c*)

It is in this sense we must read the broad and somewhat inaccurate *dictum*, that *a fine by remainder-man is void.* (*d*) The high authorities, who have advanced this unqualified position, never meant that a fine by a person who has a vested remainder expectant on an estate for life, should not operate so as to pass that vested interest through the means of an estoppel (*e*), and in that way amount to a grant. (*f*)

(*a*) 3 Atk. 135. Sed vide Touchs. 13. 28. *contra*, and *Salvin* v. *Clerk*, Cro. Car. 156. and 1 Prest. Convey. 310.

(*b*) 2 New Rep. 1. *Rowe* v. *Power*, in the House of Lords, and so far as relates to estates prior to the remainder or reversion, *Carhampton* v. *Carhampton*, Irish Term Rep. 567. expressly overruling *Ann Twist's* case, Shep. Touch. 28.

(*c*) *Doe* dem. *Burrell* v. *Perkins*, 3 M. & Sel. 271.

(*d*) See *Dormer* v. *Parkhurst*, 3 Atk. 135. 6 Brown. Parl. Ca. 351. *Carhampton* v. *Carhampton*, *supra*. The nature of the case of *Doe* v. *Harris*, 5 Maule & Sel. 326. enables us to restrict in the same way the generality of Ld. Ellenborough's observation, "that the conusor of the fine not having any seisin the fine could not consequently pass an interest."

(*e*) See 5 Cruise Dig. Tit. 35. c. 12.

(*f*) For this vide *Rowe* v. *Power*, Dom.Proc. 1805. 2 Bos. & Pull. N. R. p. 1. Lord C. J. Mansfield admits a fine can pass a vested remainder by way of grant. See also Co. Litt. 200 b. The same observations are applicable to recoveries.

2. *With reference to the subject matter of the transfer* we will consider, 1st, the general grantability of vested remainders, and, 2dly, a restriction of their grantability arising from the peculiarity of their modification.

With reference to the subject matter.

1st. It may be advanced as a general proposition, subject only to some of the rules which are mentioned in the first chapter of this Essay, that vested remainders may be granted or modified in the same manner as other hereditaments *in esse.*

It has been stated that a vested remainder cannot be granted to commence *in futuro*, because the common law does not permit a person to *reserve* to himself a less estate than he had before. (*a*) This observation, however, requires qualification; for it is only true of a *freehold* interest in the remainder, as a chattel interest carved out of the remainder *may* be granted to commence *in futuro;* and by parity of reason the common law *will* allow the grantor to reserve to himself a less estate than he had before. (*b*) There is, indeed, no reason for advancing a specific proposition on the point, since all hereditaments *in esse* stand in this respect on the same footing. (*c*)

2d. It would have been improper to terminate an examination into the grantability of a vested remainder, without mentioning a single instance of a vested remainder without a capacity for transfer. This occurs in the case of a conveyance to A and B, either generally or for their lives,

Vested remainder without a capacity for transfer.

(*a*) Watk. Conv. c. 13.
(*b*) Plowd. 254. Dyer, 264. Touch. 252. Br. Grant. 60. 36. H. 6. 38.
(*c*) Vide Dyer, 58. Co. 5. 1.

remainder to the heirs of A; where A cannot part with his remainder in fee distinct from his estate of freehold. (*a*) For we must observe, that though the rule in Shelley's case is of that pliant and controllable nature, that it does not dissolve the joint-tenancy, by blending the inheritance absolutely with and totally merging the immediate freehold, yet in this peculiar instance the two limitations (as it has been strongly but quaintly phrased,) are so *knotted and confounded* as to prevent their severance and individual existence, and consequently the remainder in fee cannot be granted away. (*b*)

It has, however, been contended in a modern work of deserved celebrity, that nothing is more *clear* than that when *several* limitations give distinct estates depending on estates more immediate, and created at the same time, and by the same deed or will, they must be *remainders;* and being distinct estates they must assume the description of remainders; and answering this description, there is no objection to the transfer of these remote estates separately from the estate of freehold as remainders. (*c*)

Hence, therefore, a distinction is taken between a lease to A and B jointly for their lives, and *after their deaths* to the heirs of B; and a grant which connects the nomination of the ancestor with the nomination of the heir; and it is inferred that in the former case the one estate may be dis-

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(*a*) 3 Co. 61 a.
(*b*) Co. Litt. 185 a. n. 2.
(*c*) 3 Prest. Conv. 67.

posed of, and the other retained. (*a*) The authorities relied upon are Wiscot's case (*b*), Littleton (*c*), and Perkins. (*d*)

But these authorities do not seem to me to warrant the cited conclusion. For, 1st, if the estate of the ancestor and heir are in any way connected, it is by the operation of the rule in Shelley's case, which is not precluded or even affected by words purporting a mere estate for life in the ancestor, but acts in the same manner whether his estate arise by expression or implication of law (*e*): 2dly, Although we term (and though it was so called in Wiscot's case) the estate of the ancestor a *remainder;* yet, in consequence of the avowed confusion of the two limitations, it is only a *partial* and *qualified* remainder; and therefore the broad conclusion of its being possessed of *all* the qualities of a remainder cannot be drawn from the circumstance of its denomination: 3dly, The case in Perkins (if a tenant in tail be seised of an acre of land, the remainder of the same acre to his right heirs, he may grant this remainder) is not in point; because a statutable protection from merger having been thrown round an estate tail, the two estates are necessarily distinct, and consequently the remainder is grantable as such. It is remarkable that Perkins should close his proposition by saying, "*yet the remainder is not executed;*" because that circumstance is the very ground of its transferability. 4thly, Littleton

(*a*) 3 Prest. Conv. 65.
(*b*) 2 Rep. 60.
(*c*) Sec. 578.
(*d*) Sec. 88.
(*e*) Vide Fearne, 29.

is likewise, and for a similar reason, not in point; for he puts a case in which the limitation of the inheritance to the ancestor is divided from his immediate freehold, by a remainder in tail in a stranger; so that of course the two limitations confer distinct estates.

Effect of an objectionable practice in purchase deeds.

It was formerly a general, and is still a partially prevailing, though objectionable, practice in purchase deeds, to convey to the purchaser and trustee, remainder to the heirs of the purchaser, in order to bar the dower of the purchaser's wife; and according to the doctrine we have examined, it is conceived, that while the joint tenancy continues, a devise of the fee cannot be made. For upon the *immediate freehold* the devise cannot operate, because of the joint tenancy (*a*); and, therefore, it either acts upon the remainder, or is totally inefficacious. Now the statute of wills (*b*), and the nature of a devise of real property, which is assimilated rather to a conveyance than to the testament of the civil law, compel us to respect the *period at which the devise is made* (*c*); and, therefore, as the remainder was not severable from the immediate freehold at the time of the will, and the latter estate cannot be passed without it, the conclusion appears inevitable that a devise by the purchaser is void. Notwithstanding, however, the apparent clearness of this inference, the capacity of the fee simple to pass by a devise, was assumed

(*a*) 3 Rep. 25. Poph. 87.
(*b*) 34 & 35 Hen. 8.
(*c*) See *Swift* v. *Roberts*, 3 Burr. 1488. 1 Black. R. 476.

by the Court of King's Bench in a recent case (*a*), without any allusion to this objection.

But there is no room whatever for the doubt which the loose language of our greatest authority (*b*) has generated in some minds, whether in the stated limitation to A and B, remainder to the heirs of A, A can grant away his whole estate in fee? There is no reason why the joint tenancy should, in this case, more than in any other, operate as an impediment to the conveyance of the undivided inheritance. But of course the rule in Shelley's case, instantaneously upon the conveyance by A, has an unqualified operation; for the joint tenancy is destroyed, and the grantee is tenant in common with B.

Pleading of the assurance.

3. *With reference to the pleading of the assurance.*

As deeds must be pleaded according to their effect (*c*), a grant by a reversioner or remainder-man must be pleaded as a release or confirmation in enlargement of estate, if so enuring, notwithstanding the form of the conveyance is that of a mere grant (*d*); and in this, as in the correlative case of a grant by the particular tenant to the remainder-man or reversioner, which enures as a surrender, the party is not left to elect the operation of the deed. (*e*)

Copyholds.

4. *With reference to copyholds.*

(*a*) *Ireson* v. *Pearman*, 3 Bar. & Cresw. 799.

(*b*) Co. Litt. 185 a.

(*c*) By the Chief Justice, in *Chester* v. *Willan*, 2 Sand. R. 96, 97. And see Sergeant Williams' note, ibid.

(*d*) Ibid.

(*e*) Ibid.

As every vested remainder is an actual estate, even in copyhold hereditaments, where, as we have seen, a remainder after an estate for life cannot take effect in possession before the death of the particular tenant (*a*), a vested remainder may be surrendered, if there be no particular custom to the contrary. (*b*) Nay further, as the admittance of the particular tenant is the admittance of the remainder-man, before the statute which in general cases obviated the necessity of a surrender to the use of a will (*c*), a devise of a remainder in copyholds was not good without that preliminary. (*d*)

It has been held (*e*), that if a lord of a manor grant the reversion or remainder after the expiration of an existing estate therein, no admittance is necessary thereon; because, Chief Justice Abbot thought (*f*), as a remainder or reversion may in freehold hereditaments be passed without livery of seisin, the same species of estate may in copyholds be given by the lord without the analogous ceremony of admittance; though the rest of the Court deduced (and it should seem more correctly) the inutility of the admittance, rather from the difference between a surrender and a grant from the lord, which last, as plainly appears by the form of pleading, includes an admittance, or rather, is identical with it.

(*a*) *Supra*, 42.

(*b*) 3 Leon. 239. 4 Leon. 9. pl. 8. *Butler* and *Lightfoot's* case.

(*c*) 55 G. 3. c. 192.

(*d*) *Church* v. *Mundy*, 12 Ves. 426.

(*e*) *Roe* v. *Loveless*, 2 Bar. & Ald. 453.

(*f*) Ibid. 456.

II. *As to the descent of vested remainders.*

Descent of vested remainders.

Vested remainders, after an estate of freehold, are not descendible by exactly the same rules of descent which govern estates in possession, or those which are subject to or expectant upon a term of years; for the cardinal rule in respect of the latter is, that *seisina facit stipitem* (*a*); and, strictly speaking, there is no *seisin* of such remainders, for that is in the tenant of the freehold. (*b*)

These remainders, therefore, being beyond the application of this principle, it follows that they likewise exclude the consequential doctrine of a *possessio fratris.* (*c*) But hereupon two observations may be made.

1st. That the first purchaser of the remainder, or the person to whose heirs the remainder is limited, is exactly in the same situation with one actually seised of the land, in reference to the transmission of his estate by descent. If, for example, there be a lease to A for life, remainder to B in fee, and B dies leaving a brother of the half blood, he is not inheritable to the remainder; and so if there be a lease to A for life, remainder to B for life, or in tail, remainder to the right heirs of A, those who are of the half blood to A cannot take the remainder in fee. (*d*)

2d. That if the heir for the time being of the remainder-man make a conveyance of the free-

(*a*) 1 Inst. 11 b.

(*b*) *Kellow* v. *Rowden*, 3 Mod. 253.

(*c*) 1 Roll. Abr. 628. 1 Inst. 14 b.

(*d*) See the principles laid down in *Ratcliffe*'s case, 3 Rep. 42 a. 1 Inst. 14 a. n. 6. 3 Mod. 253.

hold for life, in tail or in fee, whether by way of mortgage, or absolutely; whether by an innocent or tortious conveyance, and whether, (as it has been justly inferred (*a*),) by a conveyance at common law, or by way of use, taking back the fee by resulting use; he has effected a change of the freehold, and exercised such an act of ownership over it as is tantamount to a seisin, and places him on the same footing with the original purchaser of the remainder. (*b*)

For the same reason, (the absence of a seisin in the person in remainder expectant upon a freehold estate,) such a remainder of inheritance is not subject to either dower (*c*) or curtesy. (*d*)

Irregular descent of one species of vested remainders.

We may conclude this topic with noticing a species of remainders, which, from the requisition of the statute *de donis*, that the donor's intention shall be observed, is anomalous in its transmission by descent. This arises in a limitation to the heirs of the body of one who takes no freehold; where, as the rule in Shelley's case is not let in, the first person answering that description is a purchaser, and yet the lands descend *per formam doni*, in the same way as if the inheritance had fixed in the ancestor. If, for instance, such purchaser is a son, who dies without issue, leaving

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(*a*) 2 Prest. Abst. 442. where it is said by *express limitation or* resulting use; but this is inaccurate, for the grantor cannot take back the fee by express limitation of use, as it is void by coinciding with the operation of law by which the undisposed of use results. Co. Litt. 22 b. Moor, 284. pl. 437. 371. 2 Roll. Abr. 418.

(*b*) Vide 1 Inst. 15 a. 8 Rep. 35 b. Idem 191 b. *Stringer* v. *New*, 9 Mod. 363.

(*c*) Even if the remainderman be also tenant for life, if the inheritance is not executed. 1 Rol. 677. l. 15. Perk. s. 333-5.

(*c*) 1 Inst. 29 a.

a sister, she may take, and is entitled to a formedon in the descender, as if the parent was the original donee. (a) It has been remarked, that the principles on which this case is settled are not easily discoverable (b); but we may rest satisfied with the declared object of the legislature in passing the statute *de donis*; and it would be vain to search among the maxims of the common law, for the support and explanation of that which did not emanate from, but intrench upon its principles.

Quasi entail.

The appropriate title of this species of remainders is, for the reasons mentioned, a *quasi* entail. Mr. Fearne has explained the manner in which the succesion takes place under the special limitation to the heirs *male*; and his observations, to which nothing can be added, are applicable to the general doctrine.

Section III.

Destruction of vested Remainders.

As certainty of taking effect in possession forms no feature of a vested remainder, it is proper to ascertain in what cases, and by what means, it may be barred by the act of the particular tenant:

(a) Co. Litt. 26 b. Fearne, 80. to 82.

(b) But. Fearne, 83. n. (p).

for the effect of a *paramount* claim has already been necessarily noticed and explained.

The subject we are now entering upon is extremely various and extensive; but it will be the endeavour of the writer to give every part of it which might have been arranged under other heads of inquiry, with as much brevity as consists with an explanation of principle, and with a pointed reference to the doctrine of remainders.

This topic naturally divides itself into two branches.

1. Where the destruction is absolute:

2. When it is indirect and eventual.

The first division is limited to remainders after estate tail, to the consideration of which we shall therefore proceed.

Common recovery, effect of.

1. The power of enlarging by a common recovery his estate into a fee simple, and of destroying every subsequent limitation (*a*), whether vested or contingent, is indelibly inherent in every tenant in tail in possession. (*b*)

And a tenant in tail in remainder has the same power, if he can procure the concurrence of the tenant of the immediate freehold (*c*), which is never dispensed with, unless when it is vested in lessee for life, the necessity of whose joining to make a tenant to the *præcipe* is now obviated by the legislature. (*d*)

And the estate tail need not be immediately expectant on the estate for life; for when the

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(*a*) Touch. 40.

(*b*) See 10 Co. 42. a. *Portington's* case. 1 Burr. 84.

(*c*) Dyer, 252. Co. Litt. 46. 3. 6. Pigot, 28.

(*d*) 14 G. 2. c. 20.

tenant of that estate concurs, the recovery will enlarge into a fee simple, a remote estate tail, and bar all ulterior limitations. But such a recovery leaves intervening interests, whether vested or contingent, unaffected (*a*); and, therefore, the estates gained under it are subject to the liabilities of the original remainder in tail, and consequently are barrable by a second recovery legally suffered on an intermediate estate tail.

Not merely remainders and reversions, but all other ulterior limitations, whether by shifting use or executory devise (7), and whether arising by the execution of a power, or through any other medium, are barrable by a recovery duly suffered by tenant in tail. (*b*)

And of course all charges brought upon the remainder or reversion fall with it, as was exemplified in a case in which A being tenant in tail, remainder to B in tail, B granted a rent-charge, and A suffered a recovery, and died without issue; and it was held that the rent-charge was barred; 1st. because the alience of A was in under a paramount title: 2d. because the rent-charge on the remainder was good only from the possibility of

(7) Some very learned writers have stated inaccurate propositions from not adverting to this. Thus, Mr. Sergeant Williams (2 Saund. 388 d.) lays it down that one of the properties of executory devises is, that they cannot be barred by any mode of conveyance, whether by recovery, fine, or otherwise.

(*a*) *Smith* v. *Clifford*. 1 Term Rep. 738. *Meredith* v. *Leslie*, S. P. c. 7.

(*b*) *Benson* v. *Hodson*, 1 Mod. 108. 2 Lev. 28. *Goodear* v. *Clarke*, 1 Lev. 35. 1 Keb. 73. *Page* v. *Hayward*, Pigot, 176. 2 Salk. 570. Rep. Temp. Holt, 618.

the remainder's coming into possession; and, 3d, because a person claiming title under the remainder could no more falsify the recovery than the remainder-man himself. (a) (8)

Common recovery, effect of.

But a tenant in tail cannot bar, by a recovery, any charges on estates which he may have himself created; for the recoveror comes in subject to them; and were it otherwise a door would be opened to infinite injustice.

For the same reason, a remainder-man in tail cannot bar any charges, with which he has affected his remainder, by joining in a common recovery with the tenant of the immediate freehold. (b)

But the charge of a rent presents us with an important distinction between a remainder and reversion; for where a rent is by way of remainder, as in a conveyance to the use of A in tail, with remainder over, proviso that if A shall die without issue, and B be married, or of the age of twenty-one years, then he shall have a rent of two hundred pounds *per annum*, a recovery by the prior tenant in tail will bar the rent. (c) It is observable, that in the case in which this point was de-

(8) This is a mere outline of the judgment of the Court, the reasons of which are more elaborately detailed than the occasion seems to require, since nothing can be more obvious than the applicability of the maxim, *accessorium sequitur suum principale;* and the absurdity of attributing for a moment greater strength to the rent-charge (a mere adventitious appendage) than to the estate which supported it.

(a) Co. 62. Poph. 6. Moor, 154. 2 Co. 52. 6 Co. 42. Plowd. 350.

(b) 1 Rep. 62 a. 2 Rep. 52 b. 9 Rep. 10 b. Pigot, 120. 1 Wils. Rep. 277. 1 Chane. Ca. 119.

(c) 1 Mod. 108. 2 Lev. 28. 3 Keb. 274. 287. *Benson* v. *Hudson*, S.C. Bac. Abr. Rem. (I)

termined, the Court appear to have laid great stress on the circumstance of the rent being *charged* upon the remainders; but the true principle of the decision (it is conceived) is that the rent was itself by way of remainder; and whether it be charged on remainders or reversions is immaterial, because it is in both cases equally ulterior to the estate tail, and, therefore, equally liable to destruction by recovery.

But if a gift in tail be made reserving rent, and on condition of re-entry, the rent and condition are coeval with the estate tail, and consequently unbarrable, though the reversion itself is barred (*a*); which presents us with a singular exception to the maxim, that the accessory follows its principal, as the rent continues a rent-service distrainable for at common law. But the condition is only protected when annexed to the rent, for if it be collateral it will be barred with the reversion by a recovery. (*b*)

With reference to powers concurrent with the estate tail.

It has been sometimes doubted in practice, whether a *power* is concurrent with, or collateral, or (which is the same) subsequent to the estate tail (*c*); for if it be concurrent then it is exempt from the operation of the recovery, if subsequent, exposed to it. As in a conveyance to the use of A for life, remainder to such of his children as he shall appoint to, remainder to his first and other sons in tail, it has been by some supposed, that the power is destroyed by *the recovery of the tenant in tail;* but the opinion more agreeable to

(*a*) *Whyte* v. *West*, Cro.Eliz. 792. Pigot, 199.

(*b*) Fearne, Ex. Dev. 67 n. 4th edit.

(*c*) 1 Prest. Abst. 398.

principle and authority seems to be the reverse, as the use arising from the execution of the power takes precedence of the estate tail. (*a*) For though it is true that the estate tail is vested, yet as it is with a liability to be divested, it is, with respect to its eventual unqualified vestedness, in the same situation with a contingent interest; and, as the power is the representative of the estate to be created under it, it is surely absurd to affirm, that the one is open to annihilation, and at the same time admit the indestructibility of the other. (9)

Upon these grounds was determined the case of *Roper* v. *Hallifax* in the Common Pleas (*b*), in which the Court held, that the usual power of sale in the releasees to uses in a marriage settlement, was not barred by a recovery suffered by the father, the tenant for life, and his eldest son the first tenant in tail.

The conclusion, with reference to the general doctrine before us is, that the powers of selection, which are given to parents, and the powers of sale and exchange, which are given to releasees to uses in settlements, are not in the power of the

(9) Note, that any tortious conveyance by A would destroy his power; with his acts we have here no concern, and are presuming that his conveyance, from the form of it, had not that effect; and directing our attention exclusively to the operation of the recovery by the tenant in tail.

(*a*) See the reasoning, 1 Sander's Uses, 175. to 178. and Sugd. Powers, 55, 56. 3d ed.

(*b*) 1 Sand. Uses, 178. to 192. 8 Taunt. 869.; but all powers, estates, &c. *antecedent* to the estates tail were expressly confirmed. Ibid, 870. And note, also, that the deed, making the tenant to the *præcipe*, contained the 100,000*l*. clause, and the estate was vested in him only for the joint lives of him and the tenant for life.

tenant in tail; as, in order for a recovery by him to bar, it is necessary that the use should operate either as a remainder, or as a conditional limitation, upon his estate; instead of which the use originating in the execution of the power is, in legal contemplation, the effect of the instrument by which the power was reserved; and consequently prior to, and in substitution of, the estate tail, and other uses of the settlement.

But to return,

With reference to a seisin in tail by entireties.

It must be observed, that when husband and wife are seised in tail by entireties, whether merely of the immediate freehold (as in a limitation to them and the heirs of the body of the husband, remainder over), or of the executed estate tail (as in a limitation to them and the heirs of their two bodies) if the *præcipe* be brought against the husband alone, the recovery will not bind the remainder. (*a*) But if husband and wife be seised by moieties, a *præcipe* against the former alone will be good for a moiety (*b*); but as, in either case, he is seised of all the lands in right of his wife, he may alone make a third person tenant to the *præcipe*. (10) (*c*)

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(10) There are some other important distinctions on this point; but, however relevant to the view we are now taking of the doctrine of remainders, a further consideration of it would lead us too far into an extensive topic which requires an exclusive dissertation. It is sufficient, therefore, to refer to those who have ably detailed its *minutiæ*. Vide Cruise Recov. 213. 1 Prest. Conv. 51. 8. Pigot, 38. &c.

(*a*) 3 Co. 6. Moor, 210. *Owen* v. *Morgan*. Otherwise if the remainder be in himself, and he comes in as vouchee. *Cuppledike*'s case, 3 Rep. 5.

(*b*) *Hallett* v. *Sanders*, 2 Lev. 107. But there the husband was vouched; but the principle is the same.

(*c*) Pigot, 72. Roll. Ab. tit. Recov. A. pl. 4.

There are, however, two exceptions to the proposition, that a tenant in tail may by recovery duly suffered bar every remainder or ulterior interset, and those are,

Cases in which a recovery by tenant in tail does not bar the ulterior interests.

1st. Tenant in tail *ex provisione viri* (*a*), into the nature of whose estates this is not the place to scrutinize. (*b*)

2d. Tenants in tail with the remainder or reversion in the crown, in respect to which, however, the law appears unsettled; and although it is certain, that when such a limitation subsequent to an estate tail in a subject proceeds *from* the crown as a reward for service (*c*), it is unbarrable by the recovery of tenant in tail (*d*); and it is conceived, according to the better opinion, protects all estates ulterior to it (*e*); yet the books are contradictory in regard to the effect of a recovery by a subject tenant in tail, when the remainder to the crown *proceeds from a subject* (*f*), and some highly respectable authorities of modern times, basing themselves on the construction of 34 & 35 Hen. 8., and on the abhorrence of our laws against perpetuities, favour the inference, that such a remainder is not protected. (*g*)

(*a*) 11 Hen. 7. c. 20., confirmed by 32 Hen. 8. c. 36.

(*b*) Vide 1 Prest. Conv. 20 to 22. Ibid. 146 to 148.

(*c*) *Perkins* v. *Sewell*, 1 Bl. Rep. 654. 4 Burr. 2223.

(*d*) See the rules laid down 1 Inst. 372 b.

(*e*) Noy's Maxims, 82. 2 Show. 119. *Sed vide contra* 2 Roll. Abr. 393. *Sergeant's* case. 1 Prest. Conv. 19. *Neale* v. *Wilding*, 1 Wils. 275.

(*f*) Noy's Maxims 33. Noy says such an entail may be cut off.

(*g*) Mr. Macnamara and Mr. Sergeant Hill. Vide 5 Cruise Dig. 465. From the doubtfulness of the point, a title depending on the recovery of such a tenant in tail is not marketable, Vide *Blosse* v. *Clanmorris*, 3 Bligh, 62, D. P. 1821. where the reversion in fee vested in the Crown by forfeiture on attainder.

Equitable recoveries.

An *equitable* recovery has the same power over equitable interests that a legal recovery has on legal estates. (*a*) The equitable tenant in tail must obtain the concurrence of the freeholder; but the recovery is equally efficient, whether the equitable freehold exists in the tenant to the *præcipe* separate from, or combined with, the legal freehold (*b*): or, in other words, whether it is a mere equity, or at once a beneficial and legal estate. But though the Courts of Equity will recognize the equitable when thus blended with the legal estate, they will not regard the latter when stripped of the usufruct; for then there is nothing to found the jurisdiction of equity. Whereas, on the other hand, a legal recovery may be suffered by a beneficial tenant in tail on a dry legal freehold; for, as the Courts do not in general recognize trusts, the extraction of the equitable from the legal estate is immaterial; and as a mere equitable interest is the *peculium* of equity, so a mere legal interest is the *peculium* of law. And, therefore, there is the exactest analogy between legal and equitable recoveries, except in reference to the seisin of the tenant to the *præcipe*, which in the former must exist either in fact or in law; whereas in the latter it is never the effect of the conveyance to pass any thing more than a mere equitable interest. (*c*)

(*a*) *North* v. *Champernoon*, 2 Cha. Ca. 63. 78. 1 Vern. 13. 1 P. Wms. 91.

(*b*) Vide 3 P. Wms. 171. 3 Ves. 126. Sugd. Vend. 325 to 330. *sed vide contra* a *dictum* of Ld. Thurlow in *Shapland* v. *Smith*, 1 Bro. C. C. 78.; but which has been attributed to inaccuracy in the reporter.

(*c*) Vide 1 Prest. Conv. 20 to 22. Ibid. 146 to 148.

Hence flow the following conclusions:

1st. That an equitable recovery cannot be suffered on a dry legal freehold in the tenant to the *præcipe*. (*a*)

2d. That it cannot bar legal remainders, whether beneficial or fiduciary (*b*); but as an equitable estate is not merged in the legal estate when both unite in the same person, unless they are co-extensive (*c*), an equitable recovery will bar an equitable remainder in tail in the person who has the whole legal fee; as in a devise to A in fee, upon trust for B in tail, remainder in tail to the devisee in trust. (*d*) Though it has indeed been considered, that in a conveyance to the use of A in fee, upon trust for B in tail, remainder to A in *fee* upon condition, this remainder, though for many purposes extinguished in the legal estate, is so far a distinct equitable interest, as to be barrable like a similar remainder in tail by the recovery of the equitable tenant in tail. (*e*)

Estates tail in copyholds.

But in copyholds an estate tail with the remainders over, may be barred by forfeiture and regrant (*f*); but this custom, though it would of course have been good in any other manor, has been said to be peculiar to one manor. (*g*) The

(*a*) See an opinion of Mr. Fearne's, Sugd. Vend. 327. 6 ed. assuming *this* as clear.

(*b*) *Salvin* v. *Thornton*, cited 1 Brown's Cases in Chan. 73. Amb. R. 545. 699.

(*c*) 3 Ves. 339.

(*d*) *Brydges* v. *Bridges*, 13 Ves. jun. 125.

(*e*) *Robinson* v. *Cumming*, Ca. T. Talbot, 167. 1 Atk. 473. Note the annexation of the condition to the ultimate limitation.

(*f*) Gilb. Ten. 177. 1 Sid. 314. 2 Saund. 422. 2 Keb. 127.

(*g*) That of Wakefield. See 2 Saund. 422 b. n. 1. 2 Ves. 604.

more usual mode is by a species of common recovery in the lord's court, which is analogous to, and has the same effect with one in freehold hereditaments (*a*); and it is now (contrary to former opinions (*b*),) considered to be a bar by common right. (*c*) But, without a special custom, according to the better opinion (*d*), a surrender may be used for the same purpose, either as a substitutionary or concurrent means (*e*); and as it is the cheapest and most natural mode, slight evidence will establish its efficiency. (*f*) And it is now settled, that an equitable entail of copyholds is only barrable by the same means as the legal estate. (*g*)

2. *With reference to the indirect and eventual bar of a vested remainder.*

A recovery only by tenant in tail has the efficacy of totally and immediately destroying a vested remainder, unless when the remainder is limited to the tenant in tail himself, and immediately expectant on his estate, for then a fine levied according to the statutes 4 H. 7. c. 24., and 32 H. 8. c. 36. is an equally effective bar with a recovery (*h*);

(*a*) *Church* v. *Wyatt*, Moor, 637.

(*b*) Gilb. Ten. 175. T. Raym. 162. in *Clun*'s case.

(*c*) *Oldcot* v. *Level*, Moor, 753.

(*d*) *Carr* v. *Singer*, 2 Ves. 603. Willes C. J. *contra*, *quære*.

(*e*) *Everall* v. *Smalley*, 1 Wils. 26. 2 Stra. 1197. *Doe* v. *Truby*, 2 Bl. Rep. 944. *Doe* v. *Ossenbroke*, 2 Bingh. 70. In the last case there were forty-seven instances of barring by recovery; seven by surrender.

(*f*) Vide *Doe* v. *Dauncey*, 7 Taunt. 674. *Roe* v. *Jeffery*, 2 M. & Sel. 92.

(*g*) See Ld. Hardwicke's opinion in *Pullen* v. *Ld. Middleton*, 9 Mod. 484., properly considered, not inconsistent with his observations in *Radford* v. *Wilson*, 3 Atk. 815.

(*h*) *Symonds* v. *Cudmore*, 1 Salk. 338. 1 Show. 370. 4 Mod. 1.

though from its letting in the charges on the remainder, it is generally deemed in practice a less eligible assurance. (*a*) But in other cases a fine, feoffment, or warranty, works only a discontinuance, which is not a bar unless the laches of the remainder-man permit, in the first case, five (*b*) in the other case, twenty years (*c*), to elapse, without bringing a formedon after the accruer of his right: and conveyances which derive their effect from the statute of uses do not even take away the entry of the person in remainder, and he may, therefore, bring ejectment within twenty years after the determination of the estate tail. (*d*) But this proposition is restricted to bargains and sales, and covenants to stand seised, and is inapplicable to those conveyances which are primarily at common law, and to which uses are superadded; such as a fine, feoffment, or recovery to uses. From these, however, we must again except grants (*e*), and those assurances which act upon a pre-existing estate, as a release by enlargement and a confirmation; for these, being unaccompanied by livery, do not take away the entry of the remainder-man. (*f*) But the addition of a warranty to any assurance of the fee, by a legal tenant in tail in possession, produces a discontinuance. (*g*)

Fine, feoffment, and warranty.

He must, however, have the estate tail actually in possession (*h*); for so strong is the rule on this

When a discontinuance is produced.

(*a*) 1 Prest. Conv. 15.
(*b*) 4 H. 7. c. 24.
(*c*) 21 Jac. 1. c. 16.
(*d*) *Machel* v. *Clarke*, 2 Ld. Raym. 778.
(*e*) 1 Inst. 322 a. 327 b.
(*f*) See Ld. Holt's judgment in *Machel* v. *Clarke*.
(*g*) Litt. 601.
(*h*) 1 Co. 76. 1 Salk. 214. From not observing this, Blackstone's definition of a discontinuance (3 Com. 171.) is inaccurate.

point, that if A be tenant for life with intervening vested estates, remainder to himself in tail, he cannot work a discontinuance. (*a*) And it is further observable, that the fine *sur conusance de droit come ceo*, by tenant in tail in possession, does not always discontinue; for if it be preceded by a bargain and sale, or lease and release, to the conusee, the legal estate being already divested from the conusor, the operation of the fine is confirmatory only (*b*): but if the antecedent innocent assurance contain a covenant to levy a fine, and the fine be levied accordingly, the whole is consolidated, and a discontinuance is effected. (*c*)

And where a tenant in tail is competent to discontinue, a release in fee, in which the grantor covenants for himself and his heirs with the grantee and his heirs, to warrant the premises against the grantor and his heirs (but without expressly extending the warranty to the heirs of the grantee) discontinues the estate tail. (*d*)

But a husband seised *jure uxoris* cannot discontinue. (*e*)

In respect to quasi estates tail,

Quasi estates tail.

As when a tenant of a freehold not of inheritance limits to A in tail, remainder to B in fee; it is now agreed that the *quasi* tenant in tail, or tenant for life in possession joining with the remainder man in *quasi* tail (*f*), may by an ordinary

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(*a*) *Doe* v. *Jones*, 1 Bar. & Cresw. 238.

(*b*) *Seymour's* case, 10 Co. 95.

(*c*) *Doe* v. *Whitehead*, 2 Burr. 704.

(*d*) *Doe* v. *Prestwidge*, 4 M. & Sel. 178.

(*e*) 32 H. 8. c. 28. s. 6

(*f*) *Osbrey* v. *Bury*, 1 Ball & Beatty, 53.

conveyance (*a*), as fine, lease and release (*b*), bargain and sale, grant, surrender (*c*), or in equity by articles (*d*), absolutely defeat the remainder; but it is the better opinion, that a *quasi* tenant in tail cannot effect this by his will. (*e*) And this distinction appears reasonable; for though, as he cannot suffer a recovery, it is fitting that his conveyance should have the same effect with the recovery of a proper tenant in tail; yet in a will, we must remember, the right of the remainder man was created antecedently to that of the devisee, and consequently must prevail over it; for admitting the equality of their claims in abstract justice, that of the remainder man must prevail, because *qui prior est tempore potior est jure.*

In respect to a tenant for life or years,

Tortious conveyance by tenant for life.

A tenant for life or years cannot destroy a vested remainder, unless through the extreme negligence of the person entitled to it. For if he makes a tortious conveyance, it displaces the remainder, but does not even produce a discontinuance (*f*), and merely works a disseisin, and consequent forfeiture of the particular estate. Hence, therefore, the person in remainder or reversion, whose estate is displaced by the tortious conveyance, has two periods of twenty years within which

(*a*) *Wasteneys* v. *Chapple*, 1 Bro. Par. Ca. 457.

(*b*) *Norton* v. *Frecker*, 1 Atk. 524.

(*c*) *Baker* v. *Bayley*, 2 Vern. 255. *Blake* v. *Blake*, 3 Coxe's P. Wms. 10. n. 1.

(*d*) 1 Bro. Par. Ca. 457. and 1 Atk. 524.

(*e*) In *Doe* v. *Luxton*, Ld. Kenyon rather inclined to the affirmative, but the point was decided in the negative in *Dillon* v. *Dillon*, 1 Ball & Beatty, 77. See also 1 Schoales & Lef. 295.

(*f*) *Vide infra*, 145.

he may bring ejectment, the one commencing from the time at which the forfeiture is committed, the other from the death of the particular tenant (*a*); unless that conveyance be a fine, which, when duly levied by a tenant of the freehold in possession, gives to the remainder-man only two several periods of five years, commencing at the same times for the assertion of his right. (*b*)

It is observable, that Lord Coke pointedly distinguishes between an alienation working a discontinuance of an estate, which takes away an entry, and an alienation devesting or displacing of estates. As if (says he) there be tenant for life, remainder to A in tail, the remainder to B in fee, if tenant for life doth alien in fee, this doth devest and displace the remainders, but worketh no discontinuance. (*c*) But a modern writer observes, that some assurances by a tenant for life discontinue (*d*), and afterwards instances a fine (*e*). But Lord Coke, the principal authority on which he relies, does not appear to warrant this position; for when his lordship speaks of a feoffment, fine, or recovery, by tenant for life, he always calls it a *devesting*, in contradistinction to a discontinuance. With this doctrine the established practice of the Courts agrees; and were it to be subverted, the person in remainder would be driven from the right of entry, which he now has, to a formedon.

(*a*) *Per* Ld. Hardwicke, 1 Ves. 278.

(*b*) *Laund* v. *Tucker*, Cro. Eliz. 254. 3 Rep. 78 b. If the remainder-man can (but it seems he cannot) devise after the fine of the tenant for life has devested his estate, the devisee must enter within the same time in which the devisor, if living, or his heir, must have entered. *Goodright* d. *Burton*, v. *Forrester*, 1 Taunt. 578.

(*c*) 1 Inst. 327 b.

(*d*) 2 Prest. Abstr. 319.

(*e*) Ibid. 321.

When, however, a tenant for life joins in a conveyance with the person taking the inheritance in remainder, it has not a tortious operation; and, according to a modern decision (*a*), if A be tenant for life, remainder over in tail, remainder to himself in tail, he may suffer a common recovery without forfeiting his life estate. A case which, though deviating from the strictness of former decisions (*b*), and doubted by modern writers (*c*), appears founded on principles as consistent as they are liberal: for, in support of the recovery, it is perfectly consonant to the true spirit of construction, to refer the voucher to the estate tail exclusively; because the manifest intent of the recoveree, in this and similar cases, is to destroy merely the limitations and estates *ulterior* to his estate tail.

Feoffment by tenant for years.

But with regard to a tenant for years, we must observe, that a feoffment only has the effect of disturbing the remainders expectant on his estate; for a feoffment is the only conveyance which creates a disseisin (*d*), and originates a tortious freehold; and, therefore, if he levy a fine, without grounding it on a feoffment (*e*), it is open to the

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(*a*) *Smith* v. *Clifford*, 1 T. R. 738.

(*b*) *Pelham*'s case, 1 Rep. 14 b. 15.

(*c*) 1 Prest. Abstr. 354. 428. Whence it is still usual for a tenant for life, who assists a tenant in tail in suffering a recovery, to avoid a forfeiture by the clause which conveyancers call the 100,000*l*. clause, or by leaving him a reversion or interposed estate, as to which Vide post, Sect. IV.

(*d*) Even this at the present day is doubtful. It was denied in *Doe* v. *Horde*, 2 Cowp. 703.

(*e*) 27 H. 8. 20. *Then*, said Fitzherbert, the fine would *undoubtedly* be good. See also Bro. Dis. 64. 1 Burr. 92.

plea of *partes finis*, &c.; and being therefore a nullity, an actual entry is not requisite to avoid it. (*a*)

But a cestuique trust of a term cannot destroy it, without the junction or assent of his trustees, in whom the legal estate of it is vested. (*b*)

With respect to incorporeal hereditaments, &c.

Incorporeal hereditaments.

From the devesting of a vested remainder (in the sense in which we are now using that term) being a result of livery of seisin, or of what is tantamount thereto, it follows that when the nature of the interest does not admit of actual seisin it cannot be devested.

Hence, things which lie in grant, and do not pass by livery, cannot be discontinued or devested by any conveyance whatever; as if a tenant for life or years of an advowson, rent, common, &c. grants in fee, this grant only passes his estate for life (*c*), and unless it be by matter of record (*d*), is no forfeiture. A remainder, limited on an estate tail in incorporeal hereditaments, is indeed barrable by recovery, but this forms no exception to the general proposition; for a recovery works a *discontinuance*, only when it wrongfully devests or displaces the remainder or reversion without effecting a bar.

Hence, therefore, no tenant for life or years can in incorporeal hereditaments, or in (which are analogous thereto) equitable estates (*e*), devest or in any way affect the remainder.

(*a*) *Doe* v. *Perkins*, 3 M. & Selw. 271.

(*b*) *Doe* dem. *Maddock* v. *Lynes*, 3 Bar. & Cresw. 388.

(*c*) 1 Inst. 251 b.

(*d*) Ibid. 1 Roll. Abr. 852. But a fine *sur concessit* is no forfeiture, 9 Mod. 109.

(*e*) 2 P. Wms. 14. 3 Atk. 729.

Copyholds.

Copyhold estates are governed by the same rules (*a*), for as in equitable interests the legal estate is in the trustee, so in copyholds the freehold is in the lord.

We cannot conclude without remarking, that modern judges have weakened the efficacy of a feoffment by tenant for years. Consistent and uncontradicted authority does not indeed go the full length of establishing that such a feoffment is of itself evidence of fraud (*b*); for the difference on which it is grounded between ancient and modern feoffments, in respect of their concomitant solemnities, has been ably disproved (*c*): but any attendant circumstance, evincing fraud, is eagerly caught at to vitiate the conveyance; though even when vainly intended to operate on an equity it may, it seems, incur a forfeiture (*d*).

Feoffment when fraudulent.

The description which has thus been given of the manner in which vested remainders are affected by the alienation of the particular tenant, has, it is hoped, no material omission: it is, however, confessedly but an outline: any thing more would have led us into doctrines which are less allied to the learning of remainders, than to other branches of real property.

(*a*) *Pawsey* v. *Lowdall*, 2 Roll. Abr. 794. pl. 6. Style, 249. 273.

(*b*) 1 Sand. Uses, 40. *Sed vid. contr. Doe* dem. *Dormer* v. *Moody*, ibid. and 2 Prest. Conv. Pref. 32.

(*c*) But Co. Litt. 330. b (1).

(*d*) 3 Bar. & Cresw. 405., *sed quære.*

CHAPTER III.

CONTINGENT REMAINDERS.

SECTION I.

A Contingent Remainder defined, and its Criterion examined.

As the doctrine of contingent, or, as they are sometimes called, executory (*a*), remainders has been exhausted by a writer, who has deservedly established an exalted reputation, and obtained a paramount claim to the attention of the student, I shall be as concise as possible in unfolding the principles whence those rules are deduced, which form its striking qualities, and constitute its beautiful, but complicated framework.

I shall, however, fully dilate on those topics which he has omitted; on those in which the opinions he has advanced have given scope for inquiry or criticism; and on those in which abstract reasoning may be connected with, and brought to illustrate conveyancing practice.

A contingent remainder may be defined to be a remainder which is limited to a person who is not ascertainable at the time of the limitation, or which is referred for its vesting or taking effect in interest, to an event which may not happen till after the determination of the particular estate.

(*a*) 2 Bl. Com. 169.

Now with respect to the criterion of a contingent remainder, if we admit this definition to be sound, there can be little difficulty in rendering it the medium of distinguishing its subject matter.

Mr Fearne's criterion of a contingent remainder.

But that which Mr. Fearne (*a*) has proposed, falls short of universality in its application to contingent, as I have endeavoured to show, that it does in its application to vested remainders. For how does his proposition, that "the present capacity of taking effect in possession, if the possession were to become vacant, *universally* distinguishes a vested remainder from one that is contingent," hold in the case of a limitation to two for life, remainder to the survivor of them? (*b*) What can be more complete than the present capacity of the remainder for taking effect in possession, when the particular estate determines by the death of the first of them? yet what more certain than the contingency of the remainder?

Again, when a contingent limitation in fee intervenes between the first estate, and a concurrent remainder to a person *in esse*, it has the same present capacity for taking effect, as when the intervening contingent limitation is for life or in tail, and yet it is uniformly contingent. (*c*)

The erroneousness of the test originally adopted (*d*), but subsequently abandoned, or rather qualified (*e*), by Mr. Fearne, *that a remainder is contingent as often as the determination of the preceding estate itself depends on an event which may*

(*a*) Cont. Rem. 216.
(*b*) Cro. Car. 102.
(*c*) *Loddington* v. *Kime*, 1 Salk. 204. Ld. Raymond, 203.
(*d*) F. C. Rem. 3d edit. p. 4.
(*e*) Vide 4th edit. 3, 4.

never happen, is more plainly erroneous; for the consequences of that principle would be, that no remainder could be vested when it depends on a particular estate which has a contingent event for its determination. Whereas, *that* is immaterial, unless it is made the ground of vesting the remainder. (*a*)

Remainders after a prior contingent limitation of the fee.

The contingency of a remainder after a prior contingent limitation of the fee is, however, deducible from the above definition of a contingent remainder. For if lands be granted to A for life, remainder to his issue in fee, and in default of such issue then to B, the birth of the issue within the given space is manifestly that uncertain event which may or may not happen during the particular estate, and by which the remainder is kept in contingency.

It is imagined, however, that if cases of this and a similar nature were *res nova*, the Courts, in their present temper and inclination to construe interests as vested (*b*), would regard the remainder to B as vested, with a liability to be devested by the birth of the issue of A. This, indeed, they have done in the analogous case of a limitation preceded by a power of appointment (*c*): and in this view there is no reason why the contingent limitation to the issue, merely because it is a fee-simple, should *necessarily* render the ulterior interest contingent. But, however this *might* have been, it is settled, that a substituted fee by way of remainder can never be vested.

(*a*) This point is adverted to and commented on, 1 Prest. Estates, 68, 69, 70.

(*b*) Vide supra, 99, 100.

(*c*) Vide supra, 100, 101.

Remainders after contingent limitations less than the fee.

But the interposition of *other* contingent limitations does not necessarily suspend the ulterior interest: in every case the intention will prevail, and the subsequent limitation will be vested or contingent, according to the circumstance of its being intended to take effect on the failure, and consequently to be independent of the antecedent estate, or to arise only in case of the prior limitation vesting. Therefore, the problematical point will be, whether the *event* is common to all the limitations, or restricted to the immediate limitation; which, it is manifest, must depend on the particular frame of the instrument. Hence, in one branch of this class of cases, viz. where the antecedent interest is contingent only on account of the person not being *in esse*, as if lands be granted to A for life, remainder to his first son for life or in tail, remainder to B in fee, where the contingency of the intermediate remainder to the son arises merely from its peculiar nature, and consequently cannot affect the remainder to B, the ulterior remainder is always vested. And in the other branch of this class of cases, viz. where the intermediate remainder is contingent merely on account of the event, if there be a conveyance to A for life, and if B survive C, remainder to B for life, remainder to D in fee, the remainder to D is also vested (*a*); for the circumstance of B's surviving C cannot be presumed to have been intended as an essential preliminary to the vesting of the subsequent interest; and its being limited

(*a*) *Napper* v. *Sanders*, Hutt. 118, and see *Bradford* v. *Foley*, Doug. 63. *Lethieullier* v. *Tracy*, 3 Atk. 774. Amb. Rep. 204.

after the death of B is considered as merely expressive of the order in which it is to stand. But if lands be granted to trustees to the use of A for life, with a declaration that if B shall survive C, then the trustees shall be seised to the uses thereinafter declared, viz. to the use of B for life, remainder to the use of D in fee; the remainder to D is contingent(*a*), because the event upon which B's remainder depends, is expressly declared to be the ground of giving a new direction to the seisin, by which it is made to serve not merely the immediate use to B, but likewise the subsequent use to D. which is, therefore, upon the same footing. Other instances might be given, but the present suffice to illustrate the principle of this class of cases in all its bearings; and we may, therefore, conclude with observing, that although the intention, when clearly expressed, must prevail, yet in pursuance of a sound policy (*b*), the Courts will lean in favour of vesting the subsequent remainder.

So far as limitations by way of remainder ulterior to contingent remainders *may* vest, they differ fundamentally from future uses and executory devises; with respect to which, it is a rule, that all limitations subsequent to an executory interest are likewise executory, with a capacity, however, of becoming remainders (as it may be) either vested or contingent, whenever the first limitation vests in possession. (*c*) Thus if, by devise or way of

(*a*) *Doe* d. *Watson* v. *Shippard*, Doug. Rep. 75., and vide Fearne C. Rem. 8. edit. 236 & 237.

(*b*) Vide supra, 99, 100.

(*c*) Cas. Temp. Talb. 238, *Stephens* v. *Stephens*. Ibid. *Hopkins* v. *Hopkins*. Dougl. 487., *Doe* v. *Fonnereau*.

use, lands are limited to A after a future day for life, remainder to his first son; if A live until the day, the interest of the son will be transmuted from a future use or executory devise to a remainder. (*a*)

Section II.

Division of Contingent Remainders.

It is conceived that contingent remainders are primarily capable of a twofold division into

1. Such as are contingent on account of the event.

2. Such as are contingent on account of the person. (*b*)

We shall address ourselves, therefore,

I. *To such remainders as are contingent on account of the event.*

Mr. Fearne, after a definition which applies only to *this* species of contingent remainders, distinguishes contingent remainders into four sorts: 1. Where the remainder depends entirely on a contingent determination of the preceding estate itself. 2. When the contingency on which the

(*a*) See 2 Prest. Abstr. 172, 173.

(*b*) Willes C. J., in delivering the opinion of the judges, in the house of Lords, in the case of *Parkhurst* v. *Smith*, Willes's Rep. 388., lays it down, that there are but these two sorts of contingent remainders. See also 2 Bl. Com. 169. 3 Rep. 20.

remainder is to take effect, is independent of the determination of the preceding estate. 3. When the condition upon which the remainder is limited is certain in event; but the determination of the particular estate may happen before it. 4. Where the person to whom the remainder is limited is not yet ascertained, or not yet in being. (*a*)

But to me this species of contingent remainders appears to admit of no legitimate subdivision, and, at the close of this section, I shall presume to comment on Mr. Fearne's classification.

In treating of them I shall consider,

1. Those cases in which the event is good.

2. Those in which it is bad.

1. The most simple exemplification of remainders contingent on account of the event they depend on is, perhaps, in the instance of a conveyance to A for life, and if B return from Rome, remainder to C in fee; in this case the event (viz. B's return from Rome) is dubious, it may or may not happen; and the remainder depending on it is, therefore, contingent.

But the express mention of an event which is abstractedly uncertain, has not always that effect; for if the law implies as much, then it is inoperative on the maxim *expressio eorum quæ tacite insunt nihil operatur*. Thus a remainder to B for life if he survive A, the particular tenant for life, says nothing more than the law otherwise implies; because unless A die in the life time of B he cannot take in the order of limitation; and, therefore, B's remainder is vested. (*b*)

Remainder vested notwithstanding the express mention of an event.

(*a*) F. C. R. 5.

(*b*) 1 Prest. Abstr. 108, 109.

Hence B's remainder would be contingent, if it conferred any greater or less interest than an estate for his own life. (*a*)

This distinction has been mentioned, as having occasioned some difficulty in limitations involving the rule in Shelley's case; as if, in the above case, the freehold remainder to B for his own life be followed by a limitation to the heirs of his body, it is said (*b*), that the freehold of B has been contended to be vested, on the ground of its *connecting itself and drawing to itself the benefit of the limitation to the heirs.* But though the metaphorical language in which this legal process is described, is easily apprehended by the imagination, the argument is not very intelligible. For what possible difference can the *frame* of the grant make? The *interest* of B is not for a moment restricted to the period of his life. It immediately unites with the subsequent gift to the heirs, and the *instantaneous result* of the union is an estate tail in B. Surely, therefore, this *effect* is all which it can seriously be supposed the Courts would regard; for the notion which has been stated, presupposes the possibility of balancing the several limitations of the freehold and inheritance, and of ascertaining whether *the former draws up to itself, or is pulled down to the latter,* through the medium of some new principle eliciting their relative weight and quality.

So the words which are frequently used in wills to introduce a remainder expectant upon an estate tail (if tenant in tail shall die, or *shall happen* to

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(*a*) 1 Prest. Abstr. 108, 109. (*b*) Ibid.

die without issue) sound contingently; but they are, in fact, only equivalent to the regular and formal expressions (in default of such issue) which do but describe the natural expiration of the estate tail; and consequently the remainder is vested.

Referable to this principle is that important class of cases, in which the law upholds an expectant limitation as a vested remainder, by permitting a possibility to be superseded or overbalanced by a rational probability. If the particular estate be a term of years determinable on lives, (which, as we shall hereafter see, cannot support a contingent remainder) and the remainder, instead of being limited in the regular way, upon the determination of the particular estate, is limited to take effect upon the death of the *cestuique vie*, it is implied, that the event will happen during the term, and that consequently the remainder is not thereby rendered contingent and void, when the term is such as the cestuique vie cannot be reasonably supposed to survive.

Thus, in a limitation to A for ninety-nine (*a*) or eighty (*b*) years (or, it should seem, any other number of years exceeding the probable period of the life with which the term is to cease) if B shall so long live, with remainder over *after the death of B* to a person *in esse;* the possibility that the life in being may endure for ninety-nine or eighty years to come, is so small as not to constitute a contingency. For as, in legal construction, the

(*a*) Pollexf. 67.

(*b*) *Napper* v. *Sanders*, Hutt. 118.

life cannot exceed the term, the remainder is virtually limited to commence on its determination, and is, therefore, vested.

But if the term of years is so short as to leave a common possibility, that the life on which it is determinable may exceed it, the remainder will be deemed contingent: therefore, if an estate is limited to A for *twenty-one* (*a*), or even sixty years (*b*), if he shall so long live, and after his death to B in fee, this is a contingent, and, *cæteris paribus*, a void remainder; because it is not improbable that the life may exceed the term.

It has been observed, that every case of this kind must depend on the age of the person whose life is named; that seventy years may be taken as the general standard; but that health, disease, or constitution cannot be a guide for legal presumption. (*c*) But these positions, though abstractedly reasonable, seem unsupported by authority, nay, contrary to it; for in one case the opposite doctrine appears to have prevailed, where the term was only seventy years. (*d*) And in another case (*e*), which will be mentioned in the next section, the Court did not rely even on a term of ninety-nine years, but supported the remainder on another ground. But, notwithstanding these cases, it is apprehended that the propositions, above stated, are founded on the authorities which would govern the doctrine at this day.

(*a*) 3 Rep. 20 a.

(*b*) *Beverley* v. *Beverley*, 2 Vern. 131.

(*c*) 1 Prest. Estates, 82.

(*d*) *Penhay* v. *Hurrell*, Sect. III. infra.

(*e*) *Evans* v. *Weston*, Sect. III. infra.

The *events* upon which a contingent remainder may depend, appear to me divisible into two branches, Division of events.

1. Those which give birth to the remainder, but in nowise affect the particular estate.

2. Those which give birth to the remainder, and simultaneously determine the particular estate.

The case of a lease to A for life, remainder to B for life, and if B die before A, remainder to C for life, illustrates the first sort of events; because the death of B before A, which must precede and give effect to C's remainder, does not in the least affect the particular estate. (*a*)

The case of a feoffment to the use of B till C return from Rome, and after such return of C, then to remain over in fee, illustrate the second kind of events; because the return of C does at once determine the particular estate, and give effect to the remainder.

Mr. Fearne's third sort of contingent remainders grounds itself on another sort of events, viz. those which are certain, but the determination of the particular estate may happen first; as in the instance of a lease to J. S. for life, and after the death of J. D., the lands to remain to another in fee, in which it is certain that the event, viz. the death of J. D., must happen, though it may not be till after the determination of the particular estate. But is it not plain that, with reference to the remainder, the relation of the event to the particular estate is of its very essence? Then it must be admitted, that it is perfectly immaterial, whe-

(*a*) 3 Rep. 20 a. 10 Rep. 85. Co. Litt. 378.

ther the event be *abstractedly certain*, if it be *relatively uncertain*; and consequently it is nugatory in an essay on remainders to distinguish those events which are *relatively uncertain*, from those which are *abstractedly* certain.

Events which are illegal.

2. *As to those cases in which the event is bad.*

An event grounding a contingent remainder may be void in five ways.

1. By being too remote.

2. By being contrary to the nature of a remainder.

3. By being contrary to itself.

4. By being contrary to the nature of the estate they are annexed to.

5. By being contrary to the policy of the law.

As to the first.

Events void from remoteness.

It is a maxim that, *vana est potentia quæ nunquam venit in actum*: hence the law shuts its eyes against a *potentia remotissima* (*a*); and a remainder to take effect thereupon is therefore a nullity. Thus, a remainder to a bastard unborn is void, because the law will not presume the probability of such a generation. (*b*) (11)

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(11) Mr. Fearne, in treating of the nature of the contingency upon which a remainder may be limited, divides his subject into three branches; 1st, The contingent event's being an illegal act; 2d, The remote possibility of the contingent event; 3d, The condition's enuring to defeat the particular estate, and refers the limitation to a bastard not *in esse* to the *first* objection (C. Rem. 248—9.) but it is, I conceive, properly referrible to the *second*. For the reason why the law will never adjudge a grant good by reason of a possibility or expectation of a

(*a*) 2 Co. Rep. 51 b. 10 Co. 31 b. Hob. 33.

(*b*) *Blodwell* v. *Edwards*, Cro. Eliz. 509.

So a remainder to a corporation not *in esse* is void on account of the improbability of its erection during the particular estate. (*a*) But a remainder to the mayor and commonalty of D, is not void for remoteness, on account of the mayoralty being vacant when the remainder is limited (*b*).

On the same principle the law rejects a double contingency. Thus, a remainder to a person not *in esse* of a particular name, is void; for this is a possibility mounted on a possibility; because that one unborn shall come *in esse* is one possibility, and that he shall have a particular name is another. (*c*)

Doctrine of remote possibilities examined.

It is observable, however, that the learned editor of a valuable work (12) combats the proposition, laid down by his original author, that if the remainder be contingent, it *must* be limited to

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thing which is against law, being avowedly (see 2 Co. Rep. 51 b. Plow. 32.) the remoteness of the possibility, it follows that the remote possibility, in legal contemplation of a man's having illegitimate sons, is the *immediate*, and indeed, the *efficient*, cause of the voidness of a remainder to a bastard unborn. Indeed, were it otherwise, there would be equal reason for excluding a bastard *in esse* from being a grantee.

(12) Vide Watk. Elem. of Convey. by Preston, 101. Mr. Watkins, however, it must be admitted, founds his proposition erroneously upon the case of *Proctor* v. *Bishop of Bath and Wells, et al.*; for that was the case of an executory devise, void merely because the event was not embraced by the period allowed for suspending alienation. 2 Hen. Bl. 358. The event was, consequently, void, not from violating this technical doctrine of the common law, but from violating a rule of later times, which has no application to remainders.

(*a*) 2 Co. Rep. 51 a.
(*b*) 1 Inst. 264 a.
(*c*) 1 Co. Rep. 156. 2 Co. Rep. 51.

some one that may, by common possibility, or *potentia propinqua*, be *in esse*, at or before the determination of the particular estate; and concludes with affirming, that the examples do not warrant any other conclusion than that the remainder shall be limited to a person who *has* or *may have* the *capacity of taking;* and that, in all the instances of the *potentia remota*, the remainder failed, because it was limited to a person or corporation as in being, while in fact there was not any such person or corporation (*a*); and that, from the reasoning in Chumley's case, it is evident, that a remainder to such son of J. S. as *shall be called George*, or *shall be incorporated* by the name of ——, will be good, if such son be born and named, or if such corporation be incorporated before the determination of the particular estate.

But (it is with great deference submitted) the established diversity is between a remainder limited to one *by name* in particular, and such remainder limited by description or circumlocution, or between a *general* and a *special* name. (*b*) It is true, that under a present limitation to a person unborn of a particular name, his inability to take a vested remainder immediately, according to the apparent intention, is one avowed reason why the remainder is void (*c*); but *that* (it is conceived) is not because it would not have been void on account of its involving the double contingency, but

(*a*) See also 1 Prest. Abs. 128, 129.

(*b*) 1 Co. 156. 2 Co. 51. Co. Litt. 3. Hob. 33. Moore, 104. Dyer, 337. 2 Leon. 218. Roll. Rep. 254.

(*c*) Vide Bac. Abr. Rem. (C).

because the remoteness of the possibility in those limitations which are void on account of their uniting a present regard to the object with a specific designation of it, is only a secondary cause to the other, which is drawn from the incongruity of the instrument itself. A reference to a future period cannot surely *generalize* a name, which would otherwise be *special*, and put a remainder to such son of J. S. as shall be called *George*, on the same footing with a remainder *primo genito filio*, or *proximo hæredi masculo* of A, &c. The former limitation is an express recognition of two distinct and successive possibilities, and if good, our greatest text writers (*a*) have erred in illustrating fundamental principles. And how can it be said, that the reasoning in Chumley's case (*b*) leads to a different conclusion, when the Court, in the most unequivocal manner, attribute the voidness of the remainder in that case, to the *remoteness of the possibility*, which it is absurd to suppose diminished by the *mode of alluding to it*. And they further state the clear, definite proposition, that "a remainder limited in particular, by name of baptism and surname, is not good, if the person be not *in esse*." Besides the analogy which they pointed out between this case, and that of a limitation to the right heirs of J. S., (a person not in existence) and which is for the same reason void (*c*), would of itself be decisive of the question. I have been thus particular on the point, because it may be important in modern

(*a*) Fearne C. R. 252. 2 Bl. Com. 170. Co. Litt. 378.

(*b*) 2 Co. 52.

(*c*) Hobt. 33.

practice, and because the opinions of the gentleman who has endeavoured to graft a new distinction upon the doctrine, are deserving of great consideration.

Doctrine of remote possibilities, confined to the learning of remainders.

But we must here distinguish between limitations which enure as remainders, and those which enure as future uses, executory devises, or executory trusts; for in the latter the Courts appear to disregard the circumstance of a double contingency, and tolerate the limitation, if it does not suspend alienation beyond the time allowed for fettering property. For the events must be such *as must happen within that period* (*a*), and the rational object of the Courts now being only to prevent the shackling of property, which deprives it of its chief utility to an opulent and commercial people (13), they were naturally led to overlook

(13) Lord Nottingham, who presided in equity, at a time when the horror of the law for a perpetuity was supposed to equal that of nature for a *vacuum*, eloquently observes, that "a perpetuity is a settlement of an estate, or *interest in tail* with such *remainders* over, that no act or alienation of the present tenant in tail can ever bar those *remainders*; but they must continue perpetually, and be as a cloud hanging over the present possession. Such perpetuities fight against God by affecting a stability which human providence can never attain to, and are utterly against the reason and policy of the common law." Published from his MSS. Swanst. Rep. 460. The part in italics is an inaccuracy: as will be seen in the progress of this Essay, a perpetuity cannot co-exist with an anterior interest in tail.

(*a*) Vide *Stephens* v. *Stephens*, For. 432. See also 9 Ves. 131. But no remainder can, in this view, be too remote; for it is, by its own nature, protected from the inconveniences of perpetuities. Hence remainders may be in contingency even until the expiration of an estate tail. *Phillips* v. *Deakin*, 1 M. & Selw. 744.

the remoteness or number of the events, in a species of limitations to which the pre-existing doctrine of remainders bore but a slight analogy. (*a*)

Importance of distinguishing with respect to it between remainders and other limitations.

This distinction ought (it is apprehended) to be carefully observed, for surely the Courts, in the case of a remainder, would hold themselves bound by the old and firmly established doctrine of a double contingency. It has, however, been observed by Mr. Butler, that the expression of a possibility upon a possibility (which Lord Coke (*b*) says, is *never* admitted by intendment of law) must not be understood in too large a sense; for that a remainder to the son of A, who first or alone shall attain twenty-one, is so far a possibility as it depends for its effect on the happening of two possible events, that A shall have an eldest or only son, and that such son may attain twenty-one. (*c*)

But this case does not, I conceive, subvert or even infringe upon Lord Coke's position; for the circumstance of the person in remainder having to attain twenty-one cannot be regarded as a *possibility;* because that event alone would not render a remainder contingent in a limitation like the present. (*d*) Mr. Butler proceeds to cite the case of Routledge v. Dorril, in which an ulterior limitation could not vest until four events had occurred; but that was the case of an *executory trust;* and for the reasons above given, not within the principles of remainders.

(*a*) See 4 Ves. 237, 238. 331.
(*b*) 1 Inst. 25 b. 184.
(*c*) But F. C. R. 251 n. (C).
(*d*) *Boraston's*, case, 3 Co. 20. et supra, 102.

The doctrine of a double contingency is also attacked with some sharpness by Lord Nottingham, in a luminous judgment recently published from his lordship's MSS. (*a*). "To limit a possibility upon a possibility is" (his lordship says) "neither unnatural nor absurd; but the rule which is laid down to the contrary, looks like a reason of art, but has nothing at all of true reason it. If" (says he) "a term be limited to one for life, with twenty several remainders for lives to other persons successively, who are all alive and in being, so that all the candles are lighted together, this is good, though it be a possibility upon a possibility."

To this the same answer may be made: the example, as we have seen, is referrible to the doctrine of executory devises or executory trusts. (*b*)

But his lordship further affirms, that "if a remainder be limited to a person not in being, as to A for life, remainder to B for life(14), remainder to the first issue male which B shall have for life, though this be a *contingent upon a contingent*, this also is good." This case is strictly within the doctrine of remainders, and undoubted law; but I

(14) If this limitee had been *a person unborn*, the remainder to his issue *would* have been a contingency on a contingency, and *void*. Per Ld. Mansfield in *Chapman* v. *Brown*, 3 Burr. 1626., and Ld. Alvanley in *Routledge* v. *Dorril*, 2 Ves. jun. 364. And if on this account, and not merely because of its tending to a perpetuity, a remainder to the children of an unborn limitee in tail is equally so.

(*a*) 2 Swanst. Rep. 458. (*b*) Vide supra, 91, 92.

do not see its relevancy, or what the double contingency is that his lordship adverts to.

As to the second, or that class of events which are contrary to the nature of a remainder. We have already seen, that limitations depending upon such events as infringe the particular estate, cannot be supported as remainders, and are only good in devises or conveyances to uses. (*a*)

Events contrary to the nature of a remainder.

As to the third, or that class of events which are void by being contrariant in themselves; such repugnancy has been held to arise from an accompaniment of the direction for cesser in a devise or conveyance to uses, with an erroneous description of the manner in which such cesser is to be affected; whence, if the ulterior interest had been valid, it would have enured as a shifting use or executory devise. And although contrariety is the *avowed,* it may be doubted whether it is the real reason of those decisions: for in the case of a proviso *for determining an estate tail as if tenant in tail were dead* (*b*), it would be absurd to doubt the intention of the parties, as there is a clear proviso for cesser, and the addition, *as if tenant in tail were dead,* is a *falsa demonstratio,* which ought abstractedly to be innoxious; because the addition of a falsity shall never hurt when there is any manner of certainty before. (15) *Hence the leaning of the law against the defeating of estates* seems

Contrariant in themselves.

(15) Laid down in relation to the *description of parcels, per totam Curiam,* in *Swift* v. *Eyres,* Cro. Car. 546. Why might not the principle have been equally extended to every other species of description?

(*a*) Vide sup. Chap. I. Sect. VI. (*b*) *Corbet's* case, 1 Rep. 83 b.

to have cooperated in producing this conclusion; and that principle is of course inapplicable to *contingent remainders*, which, on the occurrence of the event, merely vest into estate, and leave the possession of the particular tenant undisturbed. With, however, the strongest reasons have provisoes of this nature been rejected when they made the estate of the first taker defeasible, "if" (as in one case) (*a*) "he should advisedly and effectually attempt, procure, and assent to do," or (as in another) (*b*), "if he should effectually and expressly assent, conclude, do, or go about to do," &c.; for inheritances ought not (says the law) to depend on such uncertainties as conations and goings about.

Events contrary to the nature of the estate they are annexed to.

As to the fourth, or that class of events which are void by being contrary to the nature of the estate they are annexed to; it is observable, that another cause for nullifying the event on which a future limitation depends is the inherence of certain incidents to certain estates, as, e. g. the power of a tenant in tail of suffering a common recovery, and levying a fine within the statutes 4 H. 7. c. 24. and 32 H. 8. c. 36. (*c*) For, in a conveyance at common law, a condition for the avoidance of the estate of tenant in tail, on his adopting either of those modes of assurance, is void; because as incompatible with the nature of the interest given, as a condition that he shall not marry, or an unqualified condition not to alien

(*a*) 6 Rep. 40., *Mildmay's* case.

(*b*) *Foy* v. *Hynde*, Cro. Jac. 696, 697.

(*c*) 6 Rep. 41. 10 Rep. 38 b.

annexed to a fee-simple. (*a*) Therefore, if in a conveyance to uses, or in a devise, a proviso be inserted for ceasing the estate tail on the tenant's adopting either such a fine, or a common recovery, and for vesting the lands in a stranger, the proviso is equally void. (*b*) It is, however, in the power of the grantor to prevent a discontinuance, as by a fine at common law (*c*), or by a feoffment (*d*); or even to restrain an innocent conveyance, as a lease for years (*e*); for a statutory fine, and a common recovery, being the only doors to a free alienation of estates tail, while *those* are kept open, the great object of the law is attained; and it, therefore, permits the grantor to bind up the tenant in tail's hands as he pleases. (16)

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(16) Mr. Fearne, treating of this subject, observes, that such a proviso or limitation as that in *Mary Portington*'s case, it seems, may extend to any *tortious* discontinuance or alienation, and a breach of it by any *such tortious alienation*, may give effect to the condition or the limitation over. Cont. Rem. 260. But the authorities (even those which he cites himself,) call for a more extensive proposition, and enable the donor of an estate tail to prevent even an *innocent* assurance. This would have appeared in one of the cases (*Spittle* and *Davies*' case) with which Mr. Fearne illustrates his observation; if he had stated that in that case, where a right of entry was given to an ulterior devisee, by the breach of a condition not to lease, annexed to an estate tail, the lease which was held to originate the subsequent estate, was for *years*. But had it been for the life of the lessee, it would then have been a tortious alienation.

(*a*) Which is void, whether in a devise or conveyance. Co. Litt. 206. 223 a.; *aliter* when qualified. Ibid. 223 b. 2 Leon. 82. 3 Leon. 182. 6 East, 178.

(*b*) *Mary Portington*'s case, 10 Rep. 36. *Sonday's* case, 9 Rep. 128.

(*c*) *Croker* v. *Trevithin*, Cro. Eliz. 35., and 1 Leon. 292.

(*d*) *Pierce* v. *Win*, 1 Ventr. 321. Co. Litt. 224 a.

(*e*) *Spittle* and *Davies*' case, 2 Leon. 38. Moor, 271.

These cases, therefore, in which the event has been altogether rejected for repugnancy, are not within the doctrine of remainders, but referrible to the learning of future uses and executory devises: they are, however, within the limits of my proposed design.

Events contrary to the policy of the law.

As to the fifth, or that class of events which are void by being contrary to the policy of the law; it may be objected, perhaps, that this subdivision embraces the foregoing classes of events: but I mean not here that technical policy which legal ingenuity has extracted from artificial principles, but that general policy which stands on the broad foundation of social expedience. The limitations dependent on this species of events are, therefore, void, because infected with their fraudulent intent or illegality; as in the instance of a limitation to the use of A and his heirs, provided that if he give a mortal blow to any person, that the use shall cease to him, and shall be to another; which is fraudulent to prevent an escheat (*a*): or in the instance of a conveyance to the use of, or in trust for the grantor for life, with a limitation over in the event of his bankruptcy, which thwarts the policy of the bankrupt laws. (*b*) But, in a settlement of the wife's property, the bankruptcy of

(*a*) Moor, 633. pl. 868. As to gifts or devises of land, in contradistinction to those of personal property, almost any condition or limitation, however restricting *the right of marriage*, unless it amounts to an absolute injunction of celibacy, has been considered effectual. Harg. Jurisconsult. Exercitations, 255, 256. Co. Litt. 42. *Williams* v. *Porter*, 86. 300. S. C. 1 Chanc. Cas. 142. 2 Lev. 21. See also 2 Chanc. Cas. 109. 1 Atk. 361. S. C. For. 212. Willes, 83. 3 Atk. 330. 2 Bro. C. C. 431. 2 Dick. 712. 3 Ves. 89.

(*b*) 19 Ves. 92.

the husband may be made to determine his estate, and give effect in possession to the limitation to her. (*a*) And the cases show, that, by a will or voluntary gift, a remainder, proviso, or trust, may be engrafted on a life estate, or life interest to take effect on the bankruptcy of the party; but whether a *general* provision against his aliening or incumbering it, or doing some act which would vest it, or make it liable to be vested, in another, involves an act of bankruptcy, seems still unsettled. (*b*)

II. As to remainders contingent on account of the person.

The only instance, it is apprehended, of a remainder being contingent merely on account of the uncertainty of the person, is in a limitation to the survivor of several particular tenants (17); as in the case of a conveyance to A and B for their lives, remainder to the survivor of them in fee. (*c*) Here the remainder is contingent, merely because it is uncertain who will be the survivor; for it is morally certain, that one of them will be the survivor. Hence, therefore, Mr. Fearne's definition of a contingent remainder, that it is a remainder

Remarks on Mr. Fearne's definition of a contingent remainder.

(17) Ld. C. J. Willes did not advert to this class of remainders, when he distinguished contingent remainders in *Parkhurst* v. *Smith*, Willes' Rep. 388.

(*a*) *Higinbotham* v. *Holme*, 19 Ves. 88.

(*b*) *Dommett* v. *Bedford*, 6 T. Rep. 684. 3 Ves. 149., *Cooper* v. *Wyatt*, 5 Madd. 482., have decided this point in the affirmative; — *Brandon* v. *Robinson*. 18 Ves. 429., 1 Rose, 199. *Wilkinson* v. *Wilkinson*, G. Coop. 259., in the negative, on the ground of the assignment being by operation of law. The last case in a subsequent stage is reported 3 Swanst. 515.

(*c*) Cro. Car. 102.

limited to depend on an event or condition which may never happen to be performed, or which may not happen to be performed till after the determination of the particular estate, is defective: for, in the case put, the ascertainment of the survivor is an event, which, in legal intendment, must and will happen *eo instante* the particular estate determines. It is, indeed, not settled, whether under peculiar circumstances, as in the case of a ship going down at sea, the law will not consider, that two persons died in the same indivisible moment. (*a*) But, as we have seen, the general doctrine of remainders excludes all remote possibilities; and it is admitted, and is very clear upon the strongest analogies and indisputable authority, that this remainder is contingent only from the present uncertainty of the remainder-man.

Possibility of there being no survivorship not regarded.

It being, therefore, true, that the possibility of there being no survivorship in a limitation to a plurality of persons is not regarded by law, and consequently does not create a legal *fact or contingency;* but that, on the contrary, it will be presumed, that such survivorship will always take place, so that a remainder to the survivor is contingent, merely on account of the uncertainty of the person; it follows, that the usual limitation in settlements to the daughters of the marriage, with cross-remainders between them, does not oppugn the doctrine relative to the propinquity and remoteness of the *potentia.* But in any

(*a*) Case of the representatives of General Stanwix and his daughter in Chanc. 1772. See Fearne's Posth. Works, 37. Also 1 Bl. R. 640. 6 East, 82.

other view the limitations to the survivors would be void, because the daughters not being *in esse* there would be a possibility upon a possibility.

In respect to the *eventual uncertainty* of this species of remainders, by reason of its being in the power of the antecedent freeholder, &c. (*a*) we may observe, that *that* is merely a superinduced, consequential, uncertainty; and totally different from that which arises from fixing a contingent event, as the groundwork of an expectant limitation.

But other remainders, said to be contingent on account of the person, are in truth contingent on account of the uncertain event on which they depend, viz. the fact of the remainder-man's coming *in esse* within the allowed time. Thus, if there be a conveyance to A for life, remainder to his first son then unborn, the remainder is in reality not primarily contingent on account of the uncertainty of the person, but because it is uncertain whether A will have a son; that is to say, in other words, the predominating contingency is dubiousness of the event; the question being, whether there will be that class of persons, or that particular individual to whom the remainder is limited (as the heirs of J. S., &c.) *in esse* at or before the determination of the particular estate, rather than *what* person will answer that description when the remainder shall take effect in possession. But, as the law stands, it is *correct* to class such a remainder with those which are contingent on account of

(*a*) *Vide infra*, Sect. V.

the uncertainty of the person (*a*); because their *qualities* are precisely the same. (*b*)

It is, however, observable, that a remainder to children is sometimes not contingent; even when the prospective words *to be begotten* are used: for if there be a child of that parent born at the time of the settlement, or will, it will vest in him, as it has been settled by a series of authorities, that *procreatis* and *procreandis* are in legal construction synonymous; and that the former word will therefore include children *to* be begotten, and the latter children *already* begotten (*c*), even though coupled with the words *in posterum*. (18)

The secondary classification of contingent remainders is into

1. Such as are at common law.

2. Such as are by devise or way of use; and is made distinct, because the limitations which it comprises, may subsist cotemporaneously with, and involve those of the primary, and, without doubt, the principal classification.

This division of contingent remainders, hitherto, I believe, overlooked, is derivable from the difference between contingent limitations in common law conveyances, and limitations in wills and con-

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(18) Note that the decision in 3 Leon. 87. anon. is not grounded merely on the force of these words. See *Doe* v. *Hallett*, 1 M. & Selw. 124. *Hebblethwaite* v. *Cartwright*, Cas. Temp. Talb. 31.

(*a*) Vide Willes' Rep. 388.

(*b*) Vide infra, Sect. VII. For *no* remainder, which leaves the person unascertained, is either devisable or descendible.

(*c*) 10 Edw. 3. Pasch. 20. 24 Edw. 3. Trin. 15. *Lomax* v. *Holmden*, 1 Vez. 290. *Cook* v. *Cook*, 2 Vern. 545. *Hewet* v. *Ireland*, 1 P. Wms. 426.

veyances to uses. The foundation of it is the circumstance of the former kind of limitations, when vehicles of the fee, putting it in abeyance (*a*), and the latter not (*b*). They have, therefore, different qualities, and consequently are legitimately distinguishable into different species.

Doctrine of abeyance.

Mr. Fearne might, indeed, consistently pass by this distinction, because he has strenuously contended, that the fee is never placed in abeyance at all: he rejects the doctrine of abeyance altogether, as absurd and ridiculous, *consisting of hard and hardly intelligible words.* (*c*) The abstract excellence of the doctrine of abeyance it is not necessary to inquire into. I shall only observe, that if a host of judicial decisions, when free from the slightest oppugnancy among themselves, are to be regarded as indisputable evidence of a rule of law, it is a settled principle, that when a fee-simple is limited at common law in contingency, it is in abeyance. This is a principle coeval with the common law itself; imperiously required by the system of tenures; deducible from and harmonizing with the fundamentals of the learning of remainders; a principle which has stood for ages unshaken, and indeed unattacked, until Mr. Fearne brought against it the weight of his eloquence and abilities. Strange that he should have been so totally at variance with the sentiment which he expresses on the judgment of the R. B. in *Perrin*

(*a*) Plowd. 25. 29. 35. 554. 556. 563. Co. Litt. 342 b.

(*b*) 6 Co. 17 b. 10 Co. 78. 85 b. Litt. Rep. 159. 253. 285. Carth. 262. Bac. Uses, 61. As to devises, see Raym. 28. 2 Sand. 280. 1 P. Wms. 505. 2 Bro. Cas. Parl. 1.

(*c*) Cont. Rem. 361.

v. *Blake* (*a*), when he satirizes judicial mutability, and the innovations which result from it; by the classical quotation,

> Proavos, et quæ non fecimus ipsi,
> Vix ea nostra voco. (*b*)

when assuredly those remarks are infinitely more applicable to him, who would endeavour to subvert the *maxim* of the common law in respect to abeyance, than to him (19) who merely aimed to render a *rule of construction* (20), admitting many exceptions, and confessedly flexible, subservient in all cases to a *testator's* intention.

Mr Fearne's objections to the doctrine of abeyance.

But, says Mr. Fearne, in case of a lease for life or in tail, remainder to the right heirs of J. S., if tenant for life dies, or tenant in tail dies without issue, living J. S., it is laid down, that the heirs of J. S. can never take; therefore the donor shall have the land again (*c*). And what, he continues, is this, in effect, but admitting that no more actually passed out of the grantor, than the estate to the tenant for life or in tail, until and unless J. S. died before the estate of such tenant determined. (*d*)

To which it may be answered, that a right of entry is constantly allowed in a person who has granted away his whole estate, as in the common case of a conveyance in fee upon *condition*, &c.; and that, in the case put, the death of J. S. during

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(19) Lord Mansfield. (20) The rule in *Shelley's* case.

(*a*) 4 Burr. 2579. 1 Bl. Rep. 672.
(*b*) F. C. R. 165.
(*c*) 2 Roll. Abr. 418. pl. 1, 2.
(*d*) Cont. Rem. 360.

the preceding estate is a condition *tacitè* annexed to the limitation of the contingent fee, by the law itself; and that consequently, if that event does not happen, a right of entry must arise in the grantor, because he is the only person to whom that right is given by the common law. To reject this reasoning would be, like C. J. Vaughan, to confound a reversion with a possibility of reverter. (*a*)

But Mr. Fearne observes, that he cannot but think it a more arduous undertaking to account for the operation of a feoffment or conveyance in annihilating an estate of inheritance, or transferring it to the clouds, and afterwards regenerating or recalling at the beck of some contingent event, than to reconcile to the principles, as well of common law as of *common sense*, a suspension of the complete or absolute operation of such feoffment or conveyance, till the intended channel for the reception of such inheritance comes into existence. (*b*) And, in another place, he asks if there would not be *better sense* in considering the disposition itself in all these cases put in suspense till the event or contingency referred to decides its effect. (*c*)

Of the advantage of a steady adherence to established rules of property, *quæ relicta sunt et tradita*, even when the reason of them is abstractedly absurd, or their policy antiquated, Mr. Fearne was sometimes fully sensible; and on one occasion it has been by none more ably and energetically

(*a*) Vide supra, 26.
(*b*) 361. Cont. Rem.
(*c*) 363. Cont. Rem.

enforced. (*a*) He seems there to conceive (what the author is convinced of) that a substitution of the dictates of *common sense*, in the place of artificial reasoning, produces all that injury which is consequent on deranging the order of an harmonious system, and on weakening those landmarks, the preservation of which entire, notorious, and unmoved, is a paramount consideration with every philanthropical lawyer.

But, says Mr. Fearne, the livery is admitted to have left the estate in the same plight as if it had never been made at all. (*b*)

This position is not true; for the grantor retains no tangible disposable interest, and consequently the livery takes the reversion, that is to say the inheritance, from him, and leaves him nothing but a right of reverter.

Mr. Fearne could draw no general argument from cases which have arisen on conveyances to uses. They are governed by a peculiar principle, derived from the equitable nature which they originally possessed, and which they preserved on combining with the legal estate, viz. that so much of the use as is not otherwise disposed of, remains in the grantor (*c*); and consequently when a remainder is in contingency the inheritance results. (*d*)

Resulting estate in wills and conveyances to uses.

(*a*) 165. 170. Cont. Rem.

(*b*) 363. ibid. From too hastily assuming the justness of this observation, the learned editor of the sixteenth edition of the Commentaries, vol. ii. p. 107. n. 2. treats the doctrine of abeyance, which he calls legal geography, as an *opinion* which may now be considered as exploded.

(*c*) Co. Litt. 23 a. 3 Co. 81 b. Dyer, 166.

(*d*) *Per* Holt C. J., in *Davies* v. *Speed*, Carth. 262.

And wills have in this, as in other respects, been assimilated to uses; and where in these the use results, in those the lands descend to the heir or go to the devisee. (*a*)

The doctrine of resulting estates in wills and uses applies equally when the ulterior limitation is not a remainder, but a future use or executory devise.

In wills, however, questions sometimes arise between the heir and devisee when the antecedent devise lapses.

It is now settled, that a residuary devise may carry not only the reversion, where there is a contingent remainder (*b*), but the resulting estate, where there is an interest which is executory by reason of its following the fee-simple. (*c*)

In establishing this point, the Courts have consistently relinquished the technical reasoning of the common law, which would have allowed the antecedent limitation to embrace the whole estate, for the principle that there is, in such a case, at the time of making the will, and upon the face of the will itself, an interest in the lands not fully disposed of, and that therefore the residuary devise must operate upon such interest. (21)

I shall conclude this section with observing, that

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(21) But a right of entry on condition broken, annexed to lands devised in fee, goes to the heir, and not to the residuary devisee. *Doe* v. *Pearson*, 6 East, 173.

(*a*) *Plunkett* v. *Holmes*, Raym. 28. *Purefoy* v. *Rogers*, 2 Sand. 380.

(*b*) *Rogers* v. *Gibson*, 1 Ves. 492. *Stephens* v. *Stephens*, C. T. Talb. 228.

(*c*) *Doe* v. *Scott*, 3 Maule & Sel. 300.

however much Mr. Fearne's classification of contingent remainders may have contributed to impart to his essay that beautiful and scientific arrangement for which it is so generally celebrated, it is submitted, that from what has been said its justness may be amply disproved. For whatever may be *the kind of event* upon which the remainder is made to depend; whether it be one which must certainly happen or not; whether it determine the particular estate, by forming the boundary of its prescribed duration; or whether it be a collateral appendage to the limitation, forming merely the point of time at which the remainder is to vest in interest; it is contingent for precisely the same reason, viz. the uncertainty of the events occurring before the determination of the particular estate: and since *the nature of the event does not in the slightest degree affect the qualities of the remainder*, it follows that Mr. Fearne's classification is untenable. On the other hand, the distribution of contingent remainders, which has been submitted to the reader, is not arbitrarily assumed, but founded on a difference of qualities. The diversity between the two last species we have seen; that between the two first will hereafter appear (*a*); and it will not be denied, that the only reason for affirming one contingent remainder to be of a different sort from another is a difference in its properties: whereas three of Mr. Fearne's sorts are, in *this* respect, avowedly *identical*.

(*a*) Infra, Sect. VII.

Section III.

The Estate requisite to support a contingent Remainder.

Contingent remainder supportable only by a freehold estate.

It is a rule, admitting of no exception, that the estate, essential to the support of a contingent remainder, must be a freehold. (*a*) The cause of this requisition of an immediate freehold, when a contingent interest is made expectant thereupon, is not referrible to the operation of livery; for the application of the same doctrine to incorporeal hereditaments *in esse* shows that it must have proceeded from a more extensive and important principle, viz. that the law will never (22) allow the freehold to be placed in abeyance by a limitation (*b*); as by suspension thereof there would in the feudal times have been none to answer the claims of persons asserting a right to the land. And hence it is, that a contingent remainder must be supported by a freehold estate; for, in order to prevent an abeyance, the freehold must at common law always pass out of the grantor at the creation of any freehold interest in the same hereditaments; and consequently, at the creation of a contingent

(22) Incorporeal hereditaments *not* in esse, (as rents *de novo*) are obviously out of the policy adverted to. Shephard's Touchs. 127. Plowd. 156. But the proposition in the text holds universally. In the case of a *parson*, (1 Inst. 341 a.) the freehold is in abeyance by the *act of law*.

(*a*) 1 Rep. 130 a. 134 b. 3 Rep. 20. Co. Litt. 217 a.

(*b*) 5 Rep. 194. 2 Bl. Com. 165. 1 Burr. 107. Com. Dig. Abeyance.

freehold remainder, it must reside in the particular tenant. (*a*)

And therefore, neither the principle, nor the rule, applies to contingent interests for years; for whether those interests are (as Mr. Fearne thought) (*b*) strictly remainders, or merely future contracts, as the Court deemed in the case of *Corbet* v. *Stone* (*c*), they are certainly not invalid by reason of the non-existence of a preceding freehold.

This is an intelligible doctrine, and can rarely be the occasion of any difficulties, while the original limitations remain undisturbed by any subsequent act; for whether the subject matter be a corporeal or an incorporeal hereditament, whether a common law estate or a use, a future limitation will be void as a remainder, unless this requisition of the common law be complied with.

In treating this topic, we shall consider, —

1st. Particular estates arising by expression;

2d. Particular estates arising by implication.

Now as to particular estates arising by expression, it is sufficient to say, generally, that if in any conveyance a freehold estate less than the fee-simple, and not infringed or rescinded by any ulterior limitation, be legally created, there is an adequate support for a contingent remainder; and therefore we shall proceed to the second class of this subdivision; and in going through the sub-

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(*a*) Fearne, C.Rem. 281, 282. 2 Bl. Com. 171.

(*b*) C. Rem. 285.

(*c*) Raym. 140. The writer speaks not here of modifications of the same term, but of one original term grafted upon another.

ject our attention will be collaterally directed to the learning of future uses and executory devises.

Particular estates by implication.

If A convey to the use of B *for years*, with a contingent limitation over, such limitation may be a valid remainder. (*a*) To understand this, we must remember, that as uses were at first equitable, and when they were consolidated with the land and became the legal estate, carried with them the principle which has been already mentioned as the foundation of resulting uses, viz. that so much of the use as is undisposed of remains in the grantor (*b*), it follows that, under this learning, a freehold does not necessarily pass out of the grantor on the creation of a freehold interest in the same lands, *even when that interest is limited to take effect by way of remainder*. For if A convey to the use of the right heirs of B, whether immediately, or with a preceding estate for years in a stranger, it is manifest that the use not being disposed of during A's life, it must, on the cardinal rule laid down on this point, result to himself. And as this limitation simultaneously commences with the particular estate of freehold, and possesses every other requisite to a remainder, it enures strictly as such. And if one covenant to stand seised to the use of the right heirs of another, &c., the effect as to the limitation will be the same; though the estate which supports it is not a *resulting*, but an *implied* (*c*) use at common law. (23)

(23) In respect to future limitations in covenants to stand seised, I may here suggest the extreme caution which is re-

(*a*) Vide *Penhay* v. *Hurrel*, 2 Vern. 370. 2 Freem. 258.

(*b*) Supra, 178.

(*c*) *Pybus* v. *Mitford*, 1 Vent. 352.

But if either the grantor or covenantor took back an estate for years, he could not have any resulting or implied use (*a*); for *expressio facit cessare tacitum*, and the effect of an estate arising by operation of law would, in general cases, be the annihilation of the term.

Where a resulting or implied use is prevented.

The conclusion is, that though if A convey to the use of B for years, and after the death of A remainder to the right heirs of B, the remainder is good; yet if A conveyed to the use of himself for years, remainder to the right heirs of B, the limitation is void as a remainder; and, for reasons which will presently appear, not maintainable as a future use.

The true reason, however, indeed the only one consistent with analogy, for the non-resulting of the freehold in this case, seeming to be the merger

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quired to enable the uses to arise; for a covenant that the use shall *descend, remain, or be, to,* &c. is executory, and merely gives a right of action. *Blitheman* v. *Blitheman*, Cro. Eliz. 279. See Benl. 121. pl. 153. Moor, 122, pl. 269. In regard to a direction, that *the use shall remain to one* after the death of the covenantor, (which was the language of the instrument in *Buckler* v. *Symons*, 2 Roll. Abr. 788.) we may observe, that when the freehold continues in the covenantor by implication, it seems strange to refuse that word the effect of creating a legal estate, since in cases when there is an implied particular estate, it expresses the very frame in which the future limitation would operate if valid, viz. that of a remainder. But the law is settled, and the expressions adverted to are the usual phraseology of the covenant for quiet enjoyment, in modern purchase conveyances.

(*a*) *Adams* v. *Savage*, 2 Ld. Raym. 854. 2 Salk. 679. *Rawley* v. *Holland*, 2 Eq. Ca. Abr. 753. See also 1 Ventr. 352. 2 Vern. 370. 2 Salk. 675.

which would attend its coexistence with the term in the same individual; it should follow, that when the intervention of an estate in a stranger between those interests, prevents an extinction of the term, the doctrine of resulting uses is let in, and the remainder in the example before us by consequence valid.

This *is* the inference most congenial to analogy, because it is settled, that if an estate tail be declared to the grantor, *that* does not prevent the resulting of the fee. (*a*)

But the cases in which the ulterior contingent limitation preceded by a term in a stranger is good in conveyances to uses, as a remainder, may sometimes be so modified, that without a rejection of some part of them for repugnancy, such a limitation cannot be supported. Thus, if A convey to the use of B for a term, which it cannot be presumed he will survive, e. g. for three thousand years, and after the death of A to the use of C, the limitation to C is in fact incompatible with the preceding term. And in the case of *Penhay* v. *Hurrel* (*b*), which, as stated in Vernon (24), was, in regard to the *present* point, substantially circumstanced like this, the Court held it to be

Observations on the case of Penhay v. Hurrel.

(24) We are going into this case rather for the sake of discussing an interesting point than on account of the importance of Mr. Fearne's argument upon it, for it did not *really* generate the difficulties with which he contends, as it appears by the register's book that the remainder was limited *after the expiration of the* 3000 *years' term*, and the death of the settlor. See Raithby's edition of Vern.

(*a*) Show. Cas. in Parl. 104. (*b*) Supra, 183.

supported by the preceding freehold in A, the resulting of which, it is observable, was totally immaterial in reference to the limitation to C, except to give it validity as a remainder. According to Mr. Fearne's view of the limitation to C, it could not operate *as a proper remainder*, because it was not to commence or take effect when the preceding estates were to determine. (*a*) It should seem, however, that the decision in *Penhay* v. *Hurrel* is not open to Mr. Fearne's criticism, which is founded on the circumstance of there being "a preceding term of three thousand years, which was not determinable on the life of A, at whose death the limitation to C was to take effect." It is clearly apprehended, that the ulterior limitation, held to be a remainder in that case, would have been a remainder, even if the intervening estate which was to be superseded, had been of a freehold, instead of a chattel quality. If, for instance, there be a conveyance to the use of A for life, remainder to the use of B in fee, but if C return from Rome, then after the death of A to the use of D in fee, the right of D is, it is true, a shifting use in relation to the estate of B; but if the event it depends on happens in A's life-time, then is the antecedent displaced by the subsequent fee, and the latter becomes a remainder dependent upon the estate for life. So that while a future limitation in a devise or conveyance to uses is a future use or executory devise in reference to one estate, it may be a contingent remainder in reference to another. (*b*)

(*a*) Cont. Rem. 26.

(*b*) Vide *Doe* v. *Burnsall*, 6 Term Rep. 30.

But in *Penhay* v. *Hurrel* the limitation to C was *altogether properly a remainder*, because the intermediate estate of three thousand years, unlike a *freehold* estate, did not call for the learning of conditional uses, in order to be superseded or rescinded: it might, upon every principle of law, be clearly removed by a mere declaration or circumstance which amounted to a proviso for cesser (*a*); and at the moment of its annihilation there was a particular freehold (the resulting use of A) upon which the limitation of C was strictly expectant.

But the real difficulty in cases like that of *Penhay* v. *Hurrell* arises, as we have hinted, from the manifest repugnancy in the modifications of the legal ownership; for a long term created in trustees for particular purposes, and (as it may be) not taking effect in possession until the death of the grantor, can of course never be intended to be overreached and defeated in the instant of its vesting.

The case which Mr. Butler (*b*) cites to confirm Mr. Fearne's conclusion seems inapplicable; for it appears simply to decide, that in a conveyance to A for ninety-nine years (or any long term) determinable with his life, and after his death remainder over, the reference to A's death shall, in favour of the validity, and, by consequence, of the vestedness of the remainder, be expunged, and the words "from and after" annexed to the determination of the term; a case in which there is a manifest mistake and no incongruity; the

(*a*) Vide Co. Litt. 204 a. (*b*) But. F. C. R. 25.

death of A being in fact the determination of a term which exceeds the duration of human existence. (*a*)

Before we quit this branch of the subject, we may advert to a circumstance which connects an effect of the nonresulting of the use with the interesting, but perplexed and metaphysical question of *scintilla juris* (25) in grantees to uses. For when there is a limitation of a future use, preceded by an *express* use, which *deprives the grantor of the immediate freehold*, unless the freehold reside in the *grantees to uses* it *must* be in *abeyance*, that suspended and extramundane situation which the law so justly abhors; and in this peculiar case, therefore, an argument, which is suggested by no other state of circumstances, arises for permitting a *scintilla juris* to remain in the grantees to uses. This is no place for scrutinizing that point: it may, however, be noticed, that when the most liberal and enlightened observers upon the statute of uses, who reject the idea of the *scintilla*, fortify their arguments, drawn from the spirit of that enactment, by arguments *ab inconvenienti*, they seem to have lost sight of the weighty objection against devesting the grantees to uses of every particle of estates; inasmuch as it may sometimes produce an abeyance of the freehold.

But in a will, a particular estate may pass to a *third person* by implication, when it is a necessary impli-

(25) The author understands by this phrase a particle of the actual freehold.

(*a*) Vide supra, 157, 158.

cation; as when one devises to his heir at law, after the death of his wife, she takes an estate for life (*a*): but not if he devises to a stranger. (*b*)

Let us proceed to examine when a contingent limitation in conveyances to uses, which is preceded by a term, but *not supported by an implied freehold, and, therefore, void as a remainder*, may be good as a future use.

It has been doubted, whether, if there be a conveyance to the use of A for years, and after the determination of that estate (the words formally introductory of a remainder) to the right heirs of B, the ulterior limitation is altogether void.

That such a limitation cannot enure as a future use may be given the following reasons, the combined force of which appear to me irresistible. The distinction between limitation *per verba de presenti* and *per verba de futuro*, which, in respect to executory devises, has occasioned such abundance of discussion, originated in the doctrine of uses (*c*); and although in the primitive condition of that doctrine, the presumable intention of the feoffor had as strong a claim upon the regard of the Courts as that of a devisor, yet now, when conveyances to uses have lost their equitable na-

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(*a*) H. 13. Hen. 8. 17. 1 Ventr. 376.

(*b*) *Smartle* v. *Scholar*, 2 Lev. 207., for then the implication is not a necessary implication, and therefore the title of the heir is preferred. See the expression, necessary implication, explained by Ld. Eldon, 1 V. & B. 466.

(*c*) Vide *Lamb* v. *Archer*, 1 Salk. 225. If one make a feoffment to the right heirs of B, it is bad; *aliter* where it is future, as to the right heirs of B after his death. *Per totam curiam.*

ture, and by the incorporation of the usufruct with the land have become mere legal media of transfer, they are, it is conceived, to be construed in every respect with as much strictness as common law assurances. (*a*) In a *will*, it is admitted, the intention ought to be the paramount consideration, and should always prevail when not flatly contradictory to established rules; and, therefore, although a devise to the right heirs of A without any antecedent estate, or reference to a future period, is void, in consequence of the unallowable incongruity of a *present* limitation of an interest necessarily *future* (*b*); yet if there be a preceding estate, and the ulterior limitation be directed to take effect from and after its determination, there is strong reason for allowing *that* limitation to be valid as an executory devise. Not that any case, even on a will, goes the full length of this proposition; for in the most apposite decisions on the subject(*c*), the preceding estate was a term of longer duration than the period of the life by which it was determinable; and consequently there was a future collateral event, viz. the death of the termor, which, in support of the subsequent limitation, it was presumed the testator contemplated.(*d*) If then it be doubtful in a will, whether a future limitation, simply purporting to be a contingent remainder, but void as such for want of a preceding freehold, can enure as an executory devise, except in cases

(*a*) Vide supra, 16. 33. n. (9).

(*b*) *Goodright* v. *Cornish*, 1 Salk. 226.

(*c*) Cas. Temp. Talb. 145. 150. *Doe* v. *Carleton*, 1 Wils. 225. *Harris* v. *Barnes*, 4 Burr. 2157.

(*d*) See the certificate of the Court of K. B. in *Harris* v. *Barnes*.

circumstanced like those which have been just adverted to, surely it is not too much to say, that in conveyances to uses the courts would not deem themselves at liberty to run counter to authorities and pre-established distinctions, to give effect to a limitation in a manner substantially different from the form in which the parties moulded it. And it is material to the argument, that the doctrine which is attacked by those who contend for the validity of the limitation in question as a future use, when within the rule of perpetuity, was established at a time when the intention was more consulted in the construction of conveyances to uses, and the nature of those assurances less ascertained, than at present. From this examination the following inferences are submitted to the reader: —1. That in a *devise* to a person *in esse*, for a term which he may in common probability survive, (e. g. twenty years,) remainder to the right heirs of A, the ultimate limitation may possibly be supported, on the ground that the determination of the preceding estate is of itself sufficiently future to warrant a future interest operating by way of executory devise.

Conclusions from the inquiry.

2. If, in the same case, the term be such as a person *in esse* will *not* in common probability survive; so that the death of the termor, or *cestuique vie* may be a distinct event, regarded by the testator, for the commencement of the future interest; the limitation to the heirs of A is a good executory devise. (*a*) But,

3. Such limitation would, in either case, be void

(*a*) See the authorities in the preceding note.

in a conveyance to uses, as a future use, and consequently be an absolute nullity.

The learning of conditional limitations it was deemed more expedient to bring under one connected view, in that part of the essay in which we have considered the generic attributes of a remainder (*a*), than to extract that part of it which may be peculiarly referrible to the doctrine of contingent remainders.

Section IV.

Time within which a contingent Remainder must vest.

The particular estate being the support of the remainder, it is a maxim, that the latter must vest or take effect in interest during the continuance of the former, or *eo instante*, that it determines (*b*): for if any interval were allowed, there would be a freehold commencing *in futuro*, which, we have seen, cannot be. If, therefore, there be a lease to A for life, and after his death and one day, remainder to B, &c., the remainder to B would be a nullity. (*c*) And so if there be a conveyance to A for life, remainder to the right heirs of B, and A die before B, the remainder is void (*d*); for B can have no heir in his life, as

(*a*) Supra, Ch. I. Sect. VI.
(*b*) Plowd. 25.
(*c*) Ibid.
(*d*) 1 Inst. 378 a. It would not have altered the case if B had taken an estate for years. Vide Jenk. 248. 2 Roll. Abr. 418.

nemo est hæres viventis; and consequently, at the determination of the particular estate, there is no one in whom the remainder can vest.

Posthumous child may take a remainder.

But it is now settled, that a *posthumous child* is capable of taking a remainder (*a*), limited in any instrument whatever (*b*), when it vests; as if lands be conveyed to A for life, remainder to his eldest son, &c., and A dies leaving his wife *enceinte* of a son, it vests in him while *en ventre de sa mere*, and consequently he is entitled to the intermediate profits. (*c*)

Preceding estate in several persons in common.

And where the preceding estate is in several persons in common, if a remainder in part of the land satisfies this rule it may vest, while a remainder in another part of the land may fail; for the particular tenant of one part may die before, the particular tenant of another after, the contingency. (*d*) This has been illustrated in a case of very peculiar circumstances, in which a stranger, being joint tenant of a copyhold with a feme for life, remainder to the heirs of the body of baron and feme, surrendered his moiety to the baron and feme; the former of whom surrendered both moieties to B. Of course B took nothing more than the baron could lawfully transfer, viz. two several estates pur auter vie in the two moieties, in the one for the life of the feme, in the other for that of the stranger. The feme died before the baron leaving issue, and on the maxim *nemo est hæres viventis*, the remainder was held void as

(*a*) 10 & 11 W. 3. c. 16.

(*b*) *Reeve* v. *Long*, 1 Salk. 227., as reversed in the Lords. Bull. N. P. 135.

(*c*) *Basset* v. *Basset*, 8 Vin. Abr. 87. 3 Atk. 203.

(*d*) Fearne, 310.

to her moiety. (*a*) Gilbert has impugned this decision, on the ground of its raising a conclusion, that the remainder to the right heirs of baron and feme must necessarily be void, unless the husband and wife both died at the same instant (*b*): which objection Mr. Fearne has answered, by observing, that Gilbert attributes to the original limitation, what was the effect only of subsequent acts (*c*): and this is manifestly the case; for if the wife and stranger had continued joint tenants, it would have been immaterial which of them had died first. For if the husband had died leaving the wife and stranger, the contingent remainder would have been expectant on the particular estate in the whole, and would have taken effect on the death of the wife, whether that event happened before or after the death of the stranger; if *before* that event, then the estate for life in the whole would have survived to the stranger; if *after*, to the wife. If the wife had died leaving the husband, the contingent remainder would have been supported by the estate for life surviving to the stranger; and, therefore, so far from Gilbert's inference being correct, it should seem that if the original limitations had remained undisturbed by subsequent acts, instead of an avoidance of the remainder as to a moiety being a necessary consequence, although the remainder might have been *wholly* nullified by any of the means which are adopted for the destruction of

(*a*) *Lane* v. *Pannel*, 1 Roll. R. 238.

(*b*) Gilb. Ten. 265.

(*c*) Fearne, 311.

contingent remainders, yet it could not in any way have been partially frustrated.

But although the particular estates are several, and the remainder, in consequence, may fall to the ground in the one part of the land, and be unaffected in the other, it is but one remainder, even when limited to two or more (*a*): whereas there are always distinct *reversions* on every particular estate of freehold (*b*); for a remainder is a new estate, the reversion part of the ancient fee. (*c*)

Contingent remainder may fail as to some, and take effect as to others.

So a contingent remainder may fail as to some, and take effect as to other persons, in consequence of some only of the limitees coming *in esse* during the particular estate (*d*); as in the example of a remainder to the right heirs of two, one only of whom dies during the continuance of the preceding estate, whereby the remainder vests entirely in his heirs. (*e*)

Mr. Cruise, however, in his valuable digest, has said that this doctrine seems confined to limitations at common law, and does not extend to estates created by way of devise (*f*); and he illustrates the observation with the case of *Doe* v. *Perryn*. (*g*) But *Doe* v. *Perryn* does not warrant this proposition, but only, what is indeed perfectly clear, that limitations by way of remainder in devises, like those in conveyances to uses to persons not

(*a*) Co. Litt. 183 b. 184 a.

(*b*) Ibid. 183 b. But if the donor or lessor grant the reversion to two or more persons and their heirs, they are joint tenants thereof; for they are joint *purchasers*. Ibid.

(*c*) Vide supra, 74.

(*d*) Fearne, 312.

(*e*) Comb. 467. Bro. Done et Rem. pl. 21.

(*f*) 2 Cruise, Dig. 303. 3d ed.

(*g*) 3 Durn. & East, 484.

in esse, &c. may, *during the particular estate*, confer a vested interest on those first coming *in esse*, with a liability to open and admit those born at subsequent periods; a doctrine which holds equally whether the remainder be by way of joint-tenancy (*a*), or tenancy in common. (*b*) But as all limitations by way of use or devise, which enure as contingent remainders, possess every common law liability, they consequently fall to the ground, as to those who are not *in esse* at or before the determination of the preceding freehold (*c*), though others may have taken under the same description, and they would have participated with them, if they had been born during the continuance of the particular estate. Circumstances, however, may vary the same description, and enable possibly such limitees as are born after the particular estate, to come in under the learning of springing uses or executory devises, and participate with those who have taken not merely during the particular estate, but likewise by way of remainder. (*d*)

As to these remainders which, though originally contingent, confer, when those to whom they are limited come *in esse*, a vested interest, liable to be devested in order to admit subsequently accruing shares, there can be no difficulty when they are simply limited to a class of persons not *in esse*; as to the children of tenants for life as joint

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(*a*) *Oates* d. *Hatterley* v. *Jackson*, 2 Stra. 1172.

(*b*) *Doe* v. *Perryn*, supra, *Doe* d. *Willis* v. *Martin*, 4 Durnf. & East, 89.

(*c*) *Else* v. *Osborn*, 1 P.Wms. 387.

(*d*) Vide *Mogg* v. *Mogg*, 1 Meriv. 654.

tenants or tenants in common: but the applicability of the doctrine may be sometimes doubtful. Thus in a case in which lands were limited to A for life, *remainder to the use of his second and other sons, except the first or eldest son,* severally and successively in tail, with remainders over, it was held, (there being, however, particular considerations to lead to the conclusion) that the remainder indefeasibly vested in the second or other son, who should be born living an elder; and not (as was strongly contended) a contingent remainder to such son as should be the second son of the tenant for life at his death, nor a vested remainder in such son, liable to be devested by his becoming the first or eldest by the death of his elder brother in the life of the tenant for life. (*a*)

Point of contrast between contingent remainders and future uses, &c.

This necessity of a contingent remainder's vesting within the period mentioned, presents a no less striking contrast with the doctrine of future uses and executory devises than those we have before viewed; and the reason of the difference plainly proceeds from the latter being independent of the antecedent estate. For whether the preceding tenant be in fee, in tail, or for life, he takes merely a portion of the use or estate, which is necessarily commensurate with its assigned limits; and the ulterior interest arises without any reference to such preceding estate, by force of the event upon which it is limited to spring up.

But it is observable, that in an equitable estate, whether an ordinary trust, or an equity of re-

(*a*) *Driver* v. *Frank*, 3 M. & Selw. 25., dissentient Lord Ellenborough.

demption, an interest limited by way of contingent remainder need not vest during the particular estate. (*a*)

Section V.

Destruction of contingent Remainders. (26)

In treating this subject, let us consider it,

1. With reference to the act of the party;

2. With reference to the act of law.

1. In examining the first branch of this distribution, it will be expedient to display more fully the operation of those conveyances which have been touched on, in examining their effect on vested remainders.

From the principles which have been laid down, it is manifest, that if the particular estate be destroyed, the contingent remainder dependent thereupon must likewise be annihilated: for the latter cannot then vest during the continuance of the former. The general rule, that the remainder falls with the estate which precedes it, can be exemplified in relation to vested remainders, only by cases in which the particular estate is an estate

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(26) It may be here noticed that equity does not countenance the destruction of contingent remainders, and it seems that however complete such a title under some circumstances may be in strictness of law, it is not marketable. See *Roake* v. *Kidd*, 5 Ves. jun. 647.

(*a*) *Chapman* v. *Blisset*, Cas. Temp. Talb. 145.

tail (*a*), or destroyed by a title paramount (*b*); but the rule applies in its fullest latitude to contingent remainders.

Tortious conveyance by particular tenant.

Thus a fine, feoffment, or common recovery, by tenant for life (*c*); or a fine or feoffment by tenant in tail (*d*), bars a contingent remainder dependent on his estate: for those conveyances gain a fee by disseisin, and leave no particular estate *in esse*, or in right, to support the remainder.

But if a tenant for life merely accepts a fine in fee, *that* does not bar the contingent remainder. (*e*) The fine, however, is a disclaimer on record; and therefore a forfeiture is incurred upon feudal principles (*f*); and if the owner of the next vested estate of freehold enter for the forfeiture, the contingent remainder is gone.

But if a tenant for life enfeoff in fee on condition, and enter for condition broken before the happening of the event on which a remainder, dependent on his estate, is limited to arise; then, as, according to a fundamental maxim of the common law, he is in of his original estate (*g*), the contingent remainder is restored (*h*); but otherwise if he does not enter till after that event, for then there is no particular estate *in esse* when the remainder vests. But the forfeiture is not purged by such entry; and the entry of the first vested taker for the forfeiture, at any period after

(*a*) Vide supra, 132. 141.
(*b*) Vide supra, 36.
(*c*) 1 Rep. 66., *Archer's* case.
(*d*) 1 Rep. 137 b. *Powle* v. *Veere*, Moor, 554.
(*e*) *Lloyd* v. *Brooking*, 1 Ventr. 188. See also 9 Rep. 106 b. 1 Ventr. 257, 258.
(*f*) Co. Litt. 252.
(*g*) Ibid. 202 b.
(*h*) 2 Salk. 577. 1 Raym. 314.

the feoffment, will destroy the contingent remainder. (*a*)

When the conveyance of the particular tenant is innocent.

But a fine, levied by tenant in tail, or tenant for life, of a thing which lies in grant, does not bar a contingent remainder; because a conveyance of a thing in grant cannot operate on the possession, and therefore is necessarily innocent. (*b*)

And consequently if A be tenant for life, remainder to B for life, remainder to the first son of B, B cannot by himself bar his son, because any conveyance which he makes operates merely upon the remainder, which lies in grant. (*c*)

On the same principle conveyances which derive their operation from the statute of uses, cannot bar contingent remainders; for the use is invariably restricted to the limits of the seisin which serves it, and these conveyances transfer nothing but the use, which the statute executes, by consolidating with the possession.

Hence, if tenant for life bargain and sell (*d*), or covenant to stand seised (*e*), to the use of a person in fee, he passes no greater estate than his estate for life; and the contingent remainder, therefore, continues unaffected.

A lease and release is also an innocent assurance (*f*), because every release by enlargement presupposes an estate in existence, which is to be enlarged; and consequently it does not operate on the possession, but is in the nature of a grant.

(*a*) Fearne, 350.

(*b*) 1 Inst. 251 b. 1 Roll. Abr. 852.

(*c*) Vide supra, 114.

(*d*) Gilb. Uses, 140.

(*e*) The same principle is equally applicable to this assurance.

(*f*) Vide Fearne, 322. Co. Litt. 328 a. Gilb. Rep. 236.

And, therefore, whether the lease for a year be at common law, or by statute, is immaterial.

But the liberal mind of Lord Mansfield, which always inclined to regard those fictitious suits, fines, and recoveries, merely as modes of assurance, led him to connect a fine with an antecedent bargain and sale, &c. when levied in pursuance of a covenant contained therein; and to give it the tortious operation which it does not possess when a distinct substantive transaction. (*a*)

Legal incorporation of fine or recovery, with the deed declaring the uses of it.

This legal incorporation of the fine or recovery, and the deed declaring the uses of it, has been contended for, when the former is directed to operate *solely* for the purpose of confirming the existing uses; and where, after having been directed to confirm such subsisting uses, it is directed to operate to *ulterior uses;* provided such ulterior uses be not inconsistent with the uses intended to be confirmed. (*b*)

The spirit of recent authorities warrants this argument (*c*); but there would be great inconveniencies in adopting the consequences, which flow from the *unqualified* admission of the principle, that the devesting operation of a fine or recovery is not uncontrollable. For if it be concluded, that their tortious operation is controlled as much by a *subsequent*, as by a *preceding* agreement, powers and contingent remainders must be frequently thrown into a state of suspension; and titles be, for a while, reduced to an inalienable state, from the possibility of a future declaration

(*a*) *Doe* dem. *Odiarne* v. *Whitehead*, 2 Burr. 704.

(*b*) But. Fearne, 380. (x)

(*c*) Vide 1 M. Clell. & Younge, 58. 5 Bar. & Ald. 569. et infra, Sect. VII.

of uses, which is to change a wrongful into a rightful conveyance; and that too, not from the period of the declaration, but, by its retrospective energy, from the time of the fine or recovery.

What assurances do not create a forfeiture.

But when assurances derived from the statute of uses, or a grant, confirmation, or release by enlargement, stand alone, they not only do not affect contingent remainders directly, but not even indirectly, by creating a forfeiture (*a*): for as none of them have the nature of the feudal conveyance, the reason of a fine or recovery working a forfeiture, though innocent in its immediate operation, is inapplicable to them.

But a recovery in the Lord's Court by tenant for life of copyhold hereditaments does not work a forfeiture; for it has not, like a recovery of freeholds, the effect of passing a fee by estoppel; and it is suffered with the cognizance and permission of the lord, who, as we may remember (*b*), and not the remainder-man, is the person to take advantage of a forfeiture. (*c*)

A fortiori, therefore, if a tenant for life of copyholds surrender to the use of another in fee, it is no forfeiture; for as it may be seen by the Court Rolls who is tenant, the stranger is at no loss to sue. (*d*)

As, therefore, there is an established distinction, in regard to their effect upon a contingent remainder, between tortious conveyances which act on the possession, and innocent conveyances which

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(*a*) 1 Inst. 251 b. Litt. 600. 606. 2 Leo. 60. 3 Mod. 151.

(*b*) Supra, 36.

(*c*) *Bird* v. *Kirk*, 1 New Rep. 200.

(*d*) Moor, 753. 4 Co. 23.

do not act upon the possession, either because they derive their existence from a legislative enactment, as bargains and sales and covenants to stand seised, or because the subject matter lies in grant, it seems strange, that the Courts should have laid down the broad position, that any alteration in the nature of the preceding estate, before a remainder vests, will destroy that remainder. (*a*) This position they illustrated by two instances; in the one of which they affirmed, that a contingent remainder, dependent on an estate tail, was barred by a partition between two coparceners to whom it had descended; in the other, that a contingent remainder, dependent on an estate for life in two joint tenants, was barred by a release from one of them to the other. Mr. Fearne (*b*) (it is conceived successfully) combats this doctrine on authority and on principle. He justly observes, that no legal modification or alteration, in the circumstances only, of a particular estate, can be said to determine that estate; but the determination of the particular estate is the only point of connection between such estate and the remainder; therefore, until that point is passed, there still remains the same place for a contingent remainder to take effect.

Whether *any* alteration of the particular estate destroys a contingent remainder.

The analogy adverted to strengthens Mr. Fearne's view of this point.

And a contingent remainder is not defeated by the mere devesting of the estate of the particular tenant; for a right of entry in him is at common law sufficient to support the contingent remain-

(*a*) 4 Leon. 237. pl. 363. (*b*) Cont. Rem. 338.

der (*a*), provided such right be precedent, and not arising *eo instante* with the contingency. (*b*)

Difference between right of entry and right of action in the particular tenant.

But a right of action in the particular tenant is not sufficient to support the remainder (*c*); and according to the authorities, it seems that a right of entry will not sustain a contingent remainder, limited by way of use; for it has been held, that if the particular tenant be devested by disseisin, &c., the remainders cannot vest unless the seisin be restored by an actual entry. But this doctrine assumes the existence of a *scintilla juris* in the grantees to uses; which has been denied by high authority, is a refined and metaphysical notion, productive of infinite inconveniencies, and generally rejected from modern practice.

The doctrine of *scintilla juris*.

The doctrine of *scintilla juris* does, however, rest on strong authority (27), to which we cannot at present oppose an adequate counterpoise.

Lord Chief Justice Pollexfen (*d*) clearly and strongly evinces the evils of its admission; and in this he has been followed by Mr. Fearne, who swells the catalogue of inconveniencies (*e*), and brings to the argument *ab inconvenienti* an auxiliary *in the object and express language of the statute of*

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(27) Mr. Cruise (2 Dig. 333. 3d edition) says it stands only on the authority of an extrajudicial opinion of a majority of the judges in *Chudleigh*'s case, 1 Rep. 120. Poph. 70. But to that opinion we may add the resolutions in *Wegg* v. *Villers*, 2 Roll. Abr. 796. 22 Vin. 228, 229, 230. 2 Sid. 159.

(*a*) *Lloyd* v. *Brooking*, 1 Vent. 188.

(*b*) *Per* Ld. Holt in *Thomson* v. *Leach*, 1 Ld. Raymond 316. *Biggot* v. *Smith*, 2 Roll. Abr. 796, 797.

(*c*) 1 Rep. 135 b.

(*d*) *Hales* v. *Risley*, Pollexf. 383.

(*e*) Cont. Rem. 299.

uses, which says, that the cestuique use shall be deemed in "*lawful seisin, &c. to all intents, constructions, and purposes in the law*, of and in *such like estates as he had in the use.*" (*a*)

But in the author's opinion, little reliance can be placed on the *last* argument. The statute has *not* entirely clothed uses, even when *legal estates*, with the properties of common law estates. If it *had*, they would not have possessed some of their present peculiarities. For instance, a legal estate in the use would not then have had a capacity for a conditional determination, without an entry by the grantor or his heirs. (*b*) But *that* it may be answered is a quality of the legal estate in the use, which it might have been consistent enough to invest it with, because it has a relation to an ulterior use. But the property we are speaking of in the antecedent legal use is also relative to the future or contingent use: it differs from the former, only in the *immaterial* circumstance of being of a *negative* nature; and consequently it may with equal consistency be annexed to a legal vested use.

But the truth is, I apprehend, that the present question respects not the capacities of the *legal freehold* in the use, but those of the *future or contingent use*. Now as the statute does not execute, and is in fact inapplicable to the latter, until the event happens upon which it vests into estate (*c*); and does not, therefore, extend to it at the moment at which the legal estate is de-

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(*a*) Vide 27 H. 8. c. 10. s. 1. Fearne, 300, 301.

(*b*) Vide supra, Chap. I. Sect. VI.

(*c*) Solemnly resolved, 1 Rep. 136. in *Chudleigh's* case.

vested; it follows, that no pertinent argument is deducible from the language of the statute.

And had the technical part of Mr. Fearne's objections against the *scintilla juris* been valid, it would have had but a very partial operation; for it is evidently restrainable to contingent uses limited by way of remainder.

I shall only further add, that when future uses are validly raised by a bargain and sale, or covenant to stand seised, the seisin of the bargainor or covenantor is, in reference to the *scintilla juris*, the same with that of feoffees or releasees to uses. (*a*) And therefore, if before the future use arises, a bargainor or covenantor can bar it by a tortious conveyance, its operation proceeds from the unextinguished spark of seisin, and it is not, I apprehend, strengthened by his possession of the legal and beneficial ownership. But this observation does, of course, not apply, when the ulterior use is a contingent remainder dependent on a preceding freehold in the bargainor or covenantor.

Contingent remainders in copyholds.

But to return. Contingent remainders in copyhold estates are not liable to destruction by act of the party (*b*); for the legal freehold in the lord stands, in this respect (*c*), in the same relation to the particular estate and ulterior limitations in copyholds, with an estate in trustees to support, &c. in freehold hereditaments. (*d*) Yet such are

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(*a*) See the resolutions in *Wegg* v. *Villers*, supra, 204.

(*b*) *Pawsey* v. *Lowdall*, 2 Roll. Abr. 794. pl. 6. Style, 249. 273.

(*c*) Not in others, as it seems. Ld. Eldon has doubted whether it is his duty to interpose actively to prevent waste. 10 Ves. 282.

(*d*) Vide *Lane* v. *Pannel*, 1 Roll. Rep. 238.

the anomalies of copyholds, that if there be no intervening contingent limitation, a surrender from a tenant for life to a vested remainder-man or reversioner works a perfect merger and extinguishment of the estate for life (*a*); so that we may rather compare a contingent remainder in copyholds, arising after the surrender of the antecedent life estate in the taker of the vested inheritance, to the springing of a future use ulterior to an estate for life in freehold hereditaments, which has become united with the inheritance. Again, the subordinate fee-simple estate of the copyhold, when it is what has been termed customary freehold, has been compared to an equitable estate. (*b*) But this analogy is also imperfect; for though a contingent remainder in copyholds cannot be barred by the tenant for life, even through the medium of merger, yet it becomes void, as in freehold hereditaments, if it does not vest during the continuance of the particular estate, because it does not then satisfy the instrument. (*c*)

But though a contingent remainder in copyholds is safe while the tenure continues, yet it may be barred indirectly through the medium of an enfranchisement of the particular tenant; for thereby the tenure, and with it the outstanding, protective, freehold of the lord ceases to exist; and therefore the contingent remainder acquires a liability to destruction. (*d*) But it is erroneous to

(*a*) *Dove* v. *Williot*, Cro. Eliz. 160.

(*b*) 16 East, 413.

(*c*) Gilb. Ten. 249. Fearne, 320.

(*d*) *Roe* d. *Clemett* v. *Briggs*, 16 East, 406.; the proposition in the text is all which this case decides.

attribute a destructive operation to the enfranchisement itself (*a*); for that act is perfectly neutral in respect to the relative state of the limitations (*b*), and has merely the effect of converting the freehold into copyhold tenure. (*c*)

Contingent remainders in equitable estates.

But contingent remainders in equitable estates, after estates for life, are not liable to destruction at all (*d*), and indeed though a limitation which would be a remainder in a legal interest, may perhaps, with propriety, receive the same title in an equitable interest, yet the doctrine of remainders can scarcely be said to apply to trusts; for every ulterior limitation of a trust is in substance a future or executory trust, and analogous to a future use or executory devise, rather than to a remainder.

And without doubt an equity of redemption of an estate mortgaged in fee is within this doctrine (*e*); for, notwithstanding the notions which a great judge (*f*) used to broach, that a mortgagor retained *at law* the substantial interest (*g*), it is now well settled, that before the breach of the condition he has only *a right of reverter*, and afterwards only *an estate in equity;* which it is impossible to distinguish from an estate originally equitable; and the modifications of which are, therefore, in every respect, identical with those of an express trust. (*h*)

(*a*) This error is fallen into in the marginal notes to Fearne, 6th edit. 319., and in 3 Prest. Con. 541.

(*b*) Supra, 43.

(*c*) 16 East, 415.

(*d*) *Penhay* v. *Hurrel*, 2 Freem. 213., in reference to a *conveyance* by tenant for life. Et vide 3 Atk. 729.

(*e*) See Mr. Butler's note, Fearne, 321.

(*f*) Ld. Mansfield.

(*g*) Dougl. 457. 608.

(*h*) See 2 Cruise, Dig. tit. 15. c. 3.

Revival of a contingent remainder.

We may here notice, that a contingent remainder, which has been destroyed by the act of the party, may be sometimes revived. This position may be illustrated with the case which has been mentioned already, of a tenant for life with a contingent remainder, and a feoffment in fee upon condition, but an entry for the condition broken before the contingency happens. (*a*) So where a man destroyed a contingent remainder by levying a fine, and the fine was afterwards annulled by act of parliament, it was held, that the contingent remainder was revived; but if it had been reversed for error, it had been otherwise. (*b*)

The principle of this distinction seems just and reasonable. If a legislative enactment annulled the act or instrument by which the contingent remainder was destroyed, as the power of parliament is unbounded, it may be fairly allowed a retrospective operation, and consequently inferred, that no such act or instrument ever existed. But it would have been contrary to general analogy, to have given to the reversal of a fine for error such a retrospect. When, for instance, a recovery is suffered on a freehold created by a fine, which is afterwards reversed for error, the recovery is still good. (*c*) Mr. Fearne could not, I think, have adverted to this case, when he laid it down, that if once the contingent remainder has failed for want of the existence of the preceding estate

(*a*) Supra, 199.

(*b*) *Cole* v. *Levingston*, 3 Keb. 87., cited by Northey. Ld. Raym. 314. The act was 13 & 14 Car. 2. c. 27.

(*c*) *Lloyd* v. *Evelyn*, 2 Salk. 568.

when the contingency happened, it shall *never* after arise. (*a*)

In their destructibility by a tortious conveyance of the antecedent freeholder, contingent remainders also differ from future uses and executory devises. For as they are not dependent on the preceding estate, no disturbance or alteration of it affects them (*b*), whether that estate be in fee, in tail, or for life. A *recovery* by tenant in tail does indeed bar them, as well as other limitations ulterior to the estate tail; but this is the peculiar, legitimate operation of a common recovery by tenant in tail, which is not regarded, therefore, as a tortious conveyance; but this, I apprehend, is the only instance of their liability to annihilation. It has, however, been recently made a question, whether a fine by tenant in fee, whose estate is subject to an executory devise, can defeat it by a fine with proclamations, and nonclaim for five years after the right of the subsequent devisee accrues. (*c*) Were the question decided in the affirmative, it would, of course, equally apply to future uses. But it is apprehended, that the point never can be so decided; as it would then oppose the firmly settled principle, that a fine, in order to bar by nonclaim, must devest and put to a right: an executory devise or future use is, in consequence of its being in legal intendment a mere right, unaffected by the fine at the time it

(*a*) Cont. Rem. 349. But Mr. Fearne refers to this case, ibid.

(*b*) Cro. Jac. 590. *Pells* v. *Brown*, Palm. 131. Godb. 282.

(*c*) *Romilly* v. *James*, 6 Taunt. 263. 274.

is levied (*a*); and for the fine to acquire a tortious operation afterwards, would contravene the maxim, *quod ab initio non valet tractu temporis non convalebit.* It is concluded, therefore, that in order to bar such an executory interest, the prior taker must levy a fine with nonclaim after his possession becomes adverse.

To the means of destroying future uses, which are furnished by the doctrine of *scintilla juris*, allusion has already been made. (*b*)

2. The act of law, which destroys a contingent remainder, is two-fold; 1st. That which is the effect of the act of the party. 2d. That which results merely from the relative situation of the particular tenant.

As to the first of these.

As the destruction of the particular estate is the ground of annihilating the contingent remainder, the means by which this is accomplished are not regarded; and, therefore, a merger of the particular estate is equally effective with a fine, feoffment, and recovery, in barring the contingent remainder. (*c*) Effect of merger.

Hence, if A, tenant for life, surrender to, or accept a release from, a vested remainder-man or reversioner, an intermediate contingent remainder may be excluded and barred: as, if A be tenant for life, and if B return from Rome, remainder to C for life, and the reversioner take a surrender from A, or make a release to him, A's

(*a*) See and consider 5 Rep. 123 b. 9 Rep. 106 a.

(*b*) Vide supra, 204.

(*c*) *Purefoy* v. *Rogers*, 2 Saund. 386.

estate is merged by the accession of the reversion; for an intervening contingent interest does not, like an intervening vested interest, prevent the union and consolidation of two distinct estates. (*a*)

I have alleged merger to be the *immediate* cause of the destruction of the particular estate, and consequently of the intervening contingent remainder, as well in the case of a *surrender* as in that of a *release*. It should, however, be observed, that some whose opinions have great weight, distinguish between *surrender* and *merger*; and treat the effect of the former as distinct and peculiar. (*b*) But it has always appeared to the writer, that the proximate cause of a cessation of the particular estate is merger. For if the immediate effect of a surrender, as well as of a release, is the union of the two estates; in the one case, the less with the greater; in the other, the greater with the less; why is not *merger* equally in both cases the instantaneous consequence of that union? Where is the necessity of resorting to a specific substantive operation in a surrender, when the identical effect is produced by assimilating a surrender to a release? The authorities certainly support this view of the subject. The language of the most approved text-writers is, that "the fruit and effect of a surrender is to pass the estate of the surrenderor to the surrenderee, that *hereupon the estate of the surren-*

(*a*) *Purefoy* v. *Rogers*, 2 Saund. 386.

(*b*) Shep. Touch. by Prest. 301.

dieror is drowned and extinct in the estate of the surrenderee." (*a*)

But when two interests are limited in the same instrument to the same person, and a contingent remainder is interposed between them; as in a conveyance to A for life, remainder to his first son unborn in tail, remainder to A in fee; the primary and ultimate limitations coalesce and unite only *sub modo;* for upon the birth of the son they disjoin, and admit the remainder. (*b*) But whether the limitations are so far separated, as to exclude the dower of A's wife, has been doubted; though it is apprehended, that dower ought to be devested, together with the inheritance in possession on which it attached (*c*): for, first, this modified junction of the two limitations to A can be sustained on principle, only upon the ground of a retrospective relation, in the remainder to the son, to the time of making the instrument; and, secondly, dower is but an accessory, and consequently ought to follow the fate of its principal; as in an entry by the grantor of a base fee at common law (*d*), or in an appointment by a cestuique use, who has the inheritance in default of appointment. (*e*)

Merger sub modo.

But this is the extent of the exception; for if a particular tenant and vested remainder-man convey to a third person in fee, the two estates unite, and,

(*a*) Touchst. 301. Co. Litt. 338. Co. 1. 96. Bro. Surr. 47.

(*b*) *Lewis Bowles*'s case, 11 Rep. 80.

(*c*) See accordingly *Hooker* v. *Hooker*, Rep. Temp. Hardw. 13., where *Cordal*'s case is denied.

(*d*) 1 Roll. Abr. 474.

(*e*) *Ray* v. *Pung*, 5 Bar. & Ald. 561. Supra, 61. (c)

it is conceived, in the same manner, so far as respects the present point, as if the former had surrendered to the latter. (*a*) And hence, in suffering common recoveries on an estate of freehold, and a vested remainder, the conveyancer preserves the intervening contingent interests, which it is not intended to affect, by the frame of the recovery deed. (28)

As to the second species of legal action.

Effect of a descent on the particular tenant.

It is a general rule, emanating from the above principles, that if the inheritance become united to the particular estate for life (*b*) by descent, the contingent remainder dependent thereon is destroyed.

There is, however, an exception to this rule; and that, from the indulgence with which last wills are construed, is allowed in the case of an immediate descent from the testator on the particular tenant.

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(28) The *habendum* is generally to "—— (the tenant to the *præcipe*) and his assigns, for and during the joint natural lives of himself and the said —— (tenant of the immediate freehold), to the intent, &c."

It is frequently added, "*To the use* of the said —— (tenant to the *præcipe*) and his assigns, for and during the joint natural lives of himself and the said——(tenant of the freehold);" but it is observable, that this declaration of use is *unnecessary;* because, 1st, The estate conveyed is but a particular estate, which does not admit a resulting use; (*Castle* v. *Dod*, Cro. Ja. 200.). 2d, The object of the parties, which requires the continuance of the legal estate in the tenant to the *præcipe*, is at all times of itself sufficient to prevent a resulting use. Gilb. Rep. 16. Doug. 25.

(*a*) 1 Salk. 338. And vide 3 Prest. Conv. 438.

(*b*) An estate *tail* cannot be merged. 2 Rep. 61. 8 Rep. 74. Supra, 80.

But this appears to be the only exception; for when the descent is not immediate from the testator, a merger is effected; for although the law will not allow the particular estate to be inevitably annihilated in the moment of its coming into legal existence, there is no reason why it should not be liable to destruction by a mediate descent, as well as by any other adventitious accession of the inheritance, like an estate created by deed. (*a*)

Difference of a mediate and immediate descent.

The difference between an immediate and a mediate descent is easily illustrated. If A devises to B for life, remainder to his first son (unborn), and A dies, and the lands descend on B as A's heir, the descent is what we here term immediate; and (as it has been expressed) the fee descends to the heir in some sort, but not to *confound* the estate for life, but so as to leave an opening for the remainders, when they happen to interpose between the estate for life and the fee. (*b*)

But if, in the case put, the fee had at A's death descended on C, and at C's death on B, the tenant for life, the descent from A would be mediate, and the contingent remainder, according to the distinction taken, would be barred.

In this brief explanation of the doctrine, the author has adopted the distinction between the respective effects of a mediate and immediate descent, which Mr. Fearne has drawn, and which is generally received.

The *decisions*, however, did not, it is apprehended, until a case since Mr. Fearne's time,

(*a*) Vide Fearne, 346. (*b*) Raym. 28.

warrant this distinction, but only established the inoperativeness of an *immediate* descent upon the particular tenant (*a*): but, when it is only mediate, there could have been no doubt of the soundness of the above conclusion; for the testator's intention is the only ground for throwing a protection round the particular estate, and preventing its coalition with and extinction in the inheritance; and although it is fair to imagine, in favour of the will, that he contemplated the devolution of the reversion on the particular tenant when his right heir, yet it would be extremely unreasonable to attribute to him a prospective view of so remote and contingent an event as a descent from an intermediate person upon such tenant. (*b*)

One, however, who is deservedly held in high estimation, appears to treat this distinction as a doubt which required to be removed, and a difficulty which needed explanation. (*c*) But that learned writer does not enter upon the discussion with his usual discrimination and force of reasoning; for he classes the case of *Duncomb* v. *Duncomb* (*d*), among those with which he illustrates his proposition, that where a remainder is devised in contingency, the reversion, which descends to the heir, does not merge the estate for life; whereas that case is wholly inapplicable. For,

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(*a*) *Plunkett* v. *Holmes*, 1 Lev. 11. Raym. 28. *Boothby* v. *Vernon*, 9 Mod. 147. *Archer's* case, 1 Rep. 66. Mr. Fearne denies the resolution *contra* in *Wood* v. *Ingersole*, Cro. Jac. 260.

(*b*) *Crump* d. *Woolley* v. *Norwood*, 7 Taunt. 362., has decided this point.

(*c*) Sergt. Williams, 2 Saund. 382. n. (1).

(*d*) 3 Lev. 437.

first, the remainder in question there, was adjudged to be *vested;* and, secondly, there was no descent of the inheritance at all on the tenant for life, but it was limited to him in the same instrument, and consequently would only have worked a partial merger, or (as it is called) execution *sub modo,* even if the intervening remainder had been contingent. (*a*)

When a merger is always effected.

But when the particular estate is created by will, and the inheritance descends upon it, *but not from that testator,* a merger is of course effected, and a contingent remainder, limited thereupon, consequently destroyed. (*b*)

The same proposition applies to similar limitations in deeds (*c*), for they have no pretence to exemption from merger under any circumstances.

It is manifest, from what has been already said, that an executory devise or future use is unaffected by the descent of the vested or resulting fee on the preceding taker, when his estate does not amount to an estate of inheritance. As, if there be a limitation by way of use or devise, to A for life, until B returns from Rome, and after that event to C in fee, it is a corollary from principles we have often adverted to, that the descent of the resulting inheritance on A does not prejudice the contingent executory limitation.

But the Courts have gone farther than this, in establishing the indestructibility of future uses and executory devises; and even (as it has been

(*a*) Supra, 213.

(*b*) *Kent* v. *Harpool,* T. Jones, 76, 77.

(*c*) *Hooker* v. *Hooker,* Rep. Temp. Hard. 13.

thought (*a*) in violation of true principle; for they have held, that the descent of the executory interest on the owner of the vested fee does not extinguish it; but that, on the other hand, if the vested estate be descendible to the heirs *ex parte paternâ*, and the executory interest to those *ex parte maternâ*, and the event on which the latter is to vest should arise, then, notwithstanding the union, the descent will be governed by the gift of the contingent, not by that of the vested interest. (*b*)

Section VI.

Of the Manner in which contingent Remainders are preserved from Destruction.

The liability of contingent remainders to destruction being found incompatible with the objects of settlements, was virtually avoided by an expedient which is now almost universally adopted, viz. by limiting a vested remainder to trustees between the beneficial freehold and the contingent remainder, in order to support them. We are indebted for this improvement to Sir Orlando Bridgeman and Sir Geoffry Palmer, who, during

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(*a*) 1 Prest. Est. 467. 3 Prest. Conv. 494, 495, 496.

(*b*) *Goodright* v. *Searle*, 2 Wils. 36. *Goodtitle* v. *White*, 15 East, 174.

the civil wars, forsook the bar for the humbler but safer practice of conveyancing. (*a*)

Limitation to trustees prevents a merger, when.

Hence the tenant for life cannot merge his estate, by surrendering to the first taker of a vested estate of inheritance; and if he makes a tortious conveyance, a right of entry arises in the trustees (*b*); and although the trustees may *at law* join with the particular tenant, and bar the contingent remainders, yet equity interposes, and in general cases declares them guilty of a breach of trust, and responsible for the consequences: and notice, or the absence of a valuable consideration, places the purchaser upon the same footing with the original trustee. (*c*)

Bargain and sale supposed to be invalid, when.

And on the ground, that what would not have been a *trust* before the statute of uses, is not a *use* now, it has been justly suggested, that if the trustees who have the legal estate bargain and sell to a purchaser who is affected by one of those circumstances, the conveyance is altogether void. (*d*) This principle extends to a lease and release, when the former is (as it usually is) a bargain and sale under the statute of uses. (*e*)

But though some circumstances so far justify the trustees in joining to bar the contingent remainders, as to exempt them from punishment for a breach of trust (*f*), yet perhaps the only case in

(*a*) 2 Bl. Com. 171, 172. But these trusts arose out of the doctrine in *Chudleigh*'s case, 1 Co. 120., and in *Archer*'s case, ibid. 66.

(*b*) 2 Lev. 52. 54. 3 Keb. 110. Fearne, 326.

(*c*) Fearne, 326.

(*d*) But. Fearne, 327, n. (1).

(*e*) See Mr. Butler's explanation, ibid. of *Mansell* v. *Mansell*, 2 P. Wms. 678. His reasoning, though just, is refined. It does not, however, appear to have received the consideration it deserves.

(*f*) Fearne, 329 to 338.

which the trustee can do so with safety, is when the eldest son, who is tenant in tail under the settlement, requires his concurrence (*a*), which is necessary to make a tenant to the *præcipe*, when the parent takes only an estate for years. (*b*) (29)

Trustees joining to bar contingent remainders.

For the trustees ought never (except in this case) to act in direct violation of the trust, without the direction of a Court of Equity; and that jurisdiction is very sparingly exercised. (*c*)

But it is at length settled, that trustees joining in a recovery after the first tenant in tail is of age, is *not* a breach of trust, and therefore a purchaser may safely buy under the title acquired by the recovery. (*d*)

Limitation to trustees sometimes improperly omitted.

There are some cases in which, as Mr. Butler has justly observed, the limitation to these trustees is sometimes improperly omitted; those in which it is desirable to protect the contingent remainder from the consequence of the death of the tenant for life, and a failure of the line of contingent remainders immediately expectant upon his estate, or of the cesser of his estate, by a proviso for that

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(29) This, at the present day, is not unusual in practice. The utility of the plan is obvious when the object is to protract alienation; and as the estate of the parent or husband is for a term determinable by his life, and which his life will not exceed, the only disadvantage of it is, that it loses him the privileges which the law has annexed to the enjoyment of a freehold.

(*a*) Fearne, 333. 1 Eq. Abr. pl. 1. in note.

(*b*) See *Woodhouse* v. *Hoskins*, 3 Atk. 24.; and *arg. Moody* v. *Walters*, 16 Ves. 291.

(*c*) Fearne, 337.

(*d*) *Biscoe* v *Perkins*, 1 Ves. & Beames, 485. The Lord Chancellor has since decided the same point in the same way. Sugd. Vend. 704. 6th edit.

purpose, before the vesting of an ulterior line of remainders. As, if there be a limitation to B for life, remainder to his first and other sons in tail, remainder to C's sons (unborn) in like manner, remainder to D in fee; to prevent the failure of the remainders to the sons of C, from there being none living at the decease of B without issue, there should be a limitation to trustees and their heirs, during such time as those remainders are kept in suspense. (30)

But the estate usually limited to the trustees is for the life of the tenant for life; the advantage of which is, that the ulterior limitations may be legal estates: whereas, if the trustees took the fee, they would be merely equitable, and the legal estate exposed to adventitious entanglements. And if, in a will or conveyance to uses, there is a proviso for determining the estate of the particular tenant on a certain event, and letting in the next in remainder, and the next beneficial taker be at that time unascertainable; then the estate of the trustees, limited to them in the usual way, during the life of the particular tenant, will notwithstanding continue, and support the contingent remainders. (*a*)

(30) By compressing, and but partially representing, Mr. Butler's observations, I have perhaps obscured them. The reader is, therefore, referred to his note (c), Fearne, 221. The case there put, is of a *will;* but it might, as in the text, have been stated generally, as applying to conveyances to uses. Vide supra, 29. and n. (*b*).

(*a*) *Doe* d. *Heneage* v. *Heneage*, 4 T. Rep. 13. See this case referred to, Fearne, 255., and that gentleman's opinion on it in the Appendix, 617. But it is observable, that the interest accruing by that event was a conditional limitation; and consequently required not the support of *any* particular estate; yet it was *assumed*, both by the bar and the bench, to have been a contingent remainder.

Where the estate in trustees to support cannot be created.

But the estate to support contingent remainders cannot be limited in bargains and sales, unless the trustees either pay, or are expressed to pay, a real or nominal consideration in money or money's worth (*a*); nor, in a covenant to stand seised, unless the trustees are themselves within the consideration of blood (*b*): for consideration is of the essence of these assurances, because they were originally contracts (*c*), and have become conveyances of the land only by virtue of the statute of uses.

Jurisdiction of equity.

We may conclude our notice of this estate, on the legal basis of which equity has erected particular duties, with remarking, that even when no trustees are appointed to preserve contingent remainders, equity does in some respects extend over them, and other executory interests, whether in persons *in esse* or not *in esse*, its protective care: it will prevent unreasonable waste being committed by the tenants in possession (*d*); and has even gone so far as to decree a restitution of the value to a contingent remainder-man, for waste before the contingency by the tenant in possession, in collusion with the person in fee in remainder. (*e*)

(*a*) 1 Co. 176 a. 2 Mod. 252. 1 Freem. 249. 22 Vin. 205.

(*b*) Carth. 139. Moor, 505.

(*c*) 2 Inst. 672.

(*d*) 1 Eq. Ca. Abr. 400. pl. 4.

(*e*) *Garth* v. *Cotton*, 1 Ves. 254. 546. Dick. 183. S. C. *Stansfield* v. *Habergham*, 10 Ves. 278. But as no remainder-man is entitled to action of waste against a tenant for life, unless his estate be of inheritance and immediately expectant thereon, (see 1 Inst. 218 b. n. 2.) the estate of the trustees totally precludes it.

SECTION VII.

Capacity of contingent Remainders for transfer.

I SHALL consider this subject,

1st. With reference to the act of the party.

2d. With reference to the act of law.

As to the first,

A contingent remainder is a mere right; and cannot, strictly speaking, be transferred by any *conveyance* (*a*) at common law, or under the statute of uses. (*b*)

Contingent remainders, future uses, &c. not grantable.

This is equally true of executory devises and future uses (*c*); but as these interests are not the less *executory*, because they happen to be *vested*, (i. e. because they are fixed in a particular ascertained person, or class of persons,) it follows, that, whether they are contingent or not, in respect to transferability they are *pari gradu* with contingent remainders. And when we meet, as we sometimes do in accurate writers, the proposition that an executory devise may be transferred by a common law conveyance when it shall be *vested*, we must understand it to mean, when it becomes vested in *possession*.

But when, either in a contingent remainder, future use, or executory devise, the person is ascertained, and the event only is uncertain, the interest is devisable (*d*); for it is not a mere pos-

When devisable.

(*a*) Fearne, 366.

(*b*) Vide 1 Sand. Uses, 108.

(*c*) 10 Rep. 50.; 4 Rep. 66 b.; 1 Inst. 266 a.

(*d*) *Roe* v. *Jones*, 1 Hen. Bl. 30. *Moor* v. *Hawkins*, 1 H. Bl. Rep. 33. *Jones* v. *Perry*, in error. 3 T. Rep. 88.

sibility, but within the statute of wills, which extends to all persons having an interest in lands, &c.

But when the person is unascertained, as in a limitation to A and B for their lives, remainder to the survivor of them in fee, or to A for life, remainder to the right heirs of B, the contingent remainder is not, as in the former case, a possibility coupled with an interest, but a mere possibility, and not transmissible by devise. (*a*)

This distinction equally applies to future uses and executory devises (*b*); and, it should seem, to executory interests in terms of years likewise, which, when the person was ascertained, were always held devisable. (*c*)

When bound by estoppel.

But a contingent remainder, or other executory interest, may, when in fee, be bound by estoppel, by a fine, or common recovery in which the remainder-man or future limitee is vouched. (*d*) But, if in tail, the issue will not be bound; for the estoppel is then personal to the recoveree. (*e*) But, whether in fee or in tail, it will be bound by a fine with proclamation (*f*); though it seems, that a fine, in order to effect a bar, ought to be for years (*g*); for a fine in fee of a contingent remainder, or any future or executory interest, has been assimilated (*h*) to the fine of a disseisee, which confirms the possession. (*i*)

(*a*) *Doe* v. *Tomkinson*, 2 Maule & Sel. 165.

(*b*) 3 T. Rep. 88. 94, 95.

(*c*) *Veizy* v. *Pinwell*, Pollex. 44. *Wind* v. *Jekyll*, 1 P. Wms. 572.

(*d*) 10 Mod. 45. Godb. 147.

(*e*) *Say and Sele*'s case, 10 Mod. 40.

(*f*) 4 H. 7. 32 H. 8.

(*g*) *Weale* v. *Lower*, Pollexfen, 54.

(*h*) Ibid.

(*i*) *Buckler*'s case, 2 Co. 55.

A late case in the Exchequer does, however, militate with this distinction. So far as is material to the present point, A was tenant for life, remainder to trustees to preserve contingent remainders, remainder to his wife for life, remainder to trustees, &c., remainder to the children of the marriage, remainder to the survivor of A and his wife, in fee. A and his wife, there being no issue, mortgaged in fee by lease and release, subject to the uses limited by the settlement for the children of the marriage, and covenanted to levy a fine *come ceo*, which was afterwards levied to the use of the mortgagee and his heirs, during the lives of the husband and wife and survivor, with remainder to confirm the uses of the settlement for the benefit of the children, and subject thereto to the use of the mortgagee in fee. It was held, that the contingent remainder in the survivor was not destroyed by the fine, because it was controlled and limited by the deed which led its uses, and which unequivocally showed, that the parties meant only to give the mortgagee a security for his money, and had no intention whatever to affect any of the limitations contained in the original settlement; but that the fine uncontrolled, and unruled by the deed, would have equally destroyed them all. (*a*) Davis v. Bush.

It is, perhaps, to be lamented, that the observations of the Chief Baron, who delivered the judgment of the Court, pointed principally at the *tortious operation* of the fine, instead of its operation by *extinguishment*, which was pressed by the Observations thereon.

(*a*) *Davis* v. *Bush*, 1 M. Clell. & Y. 58.

bar. The assumption of his lordship, that *none* of the contingent remainders were *intended to be affected*, cannot (it is submitted with great deference) be admitted. For although it was clear, that the limitation to the *children* was not destroyed, yet the parties unquestionably *intended to pass* the contingent remainder in the survivor; as, subject to the interest of the children, the *fee was limited to the use of the mortgagee.* As, therefore, the deed which led the uses of the fine, contained this express limitation, it left no avenue for presumption.

If the circumstance of that deed being by way of mortgage made a difference, it would be a renovation of that anomaly which Lord Mansfield endeavoured to introduce into our system of property, of considering a mortgage at law as in equity a mere pignorititious transfer, leaving the substantial interest in the mortgagor (*a*); a doctrine which, though abstractedly rational, and consonant to that great man's liberal and enlightened mind, is much to be deprecated, if we are to regard our laws as a science; and which, therefore, later judges have unhesitatingly rejected. (*b*)

Effect of the fine and deed of uses being construed together.

But when the deed of uses of a fine *come ceo*, levied by a contingent remainder-man, or executory devisee, &c., limits only an estate for years, then, if the fine is levied in pursuance of a covenant contained in that deed, so that they may be construed together, and as forming one integral

(*a*) Doug. 457—608. (*b*) 1 Brod. & Bingh. 238.

assurance (*a*), an estoppel is doubtless effected, the same as if the fine itself had been *sur concessit* for years. (*b*)

The distinctions we have examined are sometimes adverted to in general practice, in one case of frequent occurrence, which is too important to be passed over without consideration.

Observations on the case of Vick v. Edwards.

In the well known case of *Vick* v. *Edwards* (*c*), lands were devised to two trustees and the survivor of them, and the heirs of such survivor, in trust to sell; and Lord Talbot held, that the fee did not vest in the trustees, but being limited to the survivor was consequently in contingency; but that a fine from the trustees would pass a title to a purchaser by estoppel; and cited the case of *Weale* v. *Lower*.

But Mr. Fearne has pronounced an almost unqualified censure upon it (*d*); and his observations, which even purport to evince its incongruity and absurdity, have been generally acquiesced in: but, with great submission, the writer doubts the justness of the criticism, and of the prevailing opinion on the doctrine; and the illustrious name of Lord Talbot will protect him from the imputation of arrogance, in venturing to weigh his authority with that of those who have impugned it.

Mr. Fearne denies the applicability of *Weale* v. *Lower*, because in that case the fine was levied by the remainder-man, and did not at all affect the

(*a*) *Herring* v. *Brown*, Carth. 22. *Doe* dem. *Odiarne* v. *Whitehead*, 2 Burr. 704. *Tyrrel* v. *Marsh*, 3 Bing. 31. et vide supra, 201.

(*b*) Vide supra, 224. and *Davis* v. *Bush*, supra.

(*c*) 3 P. Wms. 372.

(*d*) Cont. Rem. 357 to 359.

particular estate; whereas, in the principal case, he says, the question would have been, whether the fine of the trustees, being tenants for life, would not have destroyed the contingent remainder in fee to the survivor, &c.

Now, we are to observe, that in *Weale* v. *Lower* the distinction between a fine *in fee* and a fine *for years* was taken, and the effect of *binding* by estoppel was denied to the former, and attributed to the latter. Consequently, when Lord Talbot affirmed *generally*, that a fine was sufficient to make a title to the purchaser, and immediately referred to the case of *Weale* v. *Lower*, he meant *a fine for years*.

This leaves the question, whether assuming the effect, which Lord Talbot attributed to the limitations, *such a fine* would have had the operation of binding the contingent remainder in the survivor by estoppel?

Mr. Fearne does not notice the distinction taken in *Weale* v. *Lower*; and it may be advanced, that, however doubtful it may be, whether a fine in fee will *not* bind by estoppel(*a*), there is no doubt that a fine for years possesses that operation; and, therefore, it might have bound the contingent remainder in *Vick* v. *Edwards*, unless it operated tortiously.

But such a fine is an innocent assurance (*b*), and, therefore, it might have bound the contingent fee, and at the same time passed an estate in possession, without destroying or disturbing

(*a*) Vide But. Co. Litt. 191a. Sugd. Gilb. Uses, 124.

(*b*) *Pigott* v. *Salisbury*, 2 Mod. 109.

the interest ulterior to the particular estate for life.

Mr. Fearne proceeds, however, to attack Lord Talbot's construction of the limitation, affirming, that the devise being to the trustees, in trust to sell, would have carried, in the very nature of the trust, such an estate as should enable the trustee to perform the trust, by disposing of the fee, in exclusion of the heir at law, supposing the devise to the trustees there had been indefinite, without any words of limitation at all, either to the survivor or the heirs, &c.

Now, with great deference, this construction is tenable upon no recognized principles: for the annexation of a trust for sale creates a fee by implication only; and it must be conceded, that implication ought not to break down and neutralize an express limitation, which would have been the case in *Vick* v. *Edwards*, if the limitation to the survivor and his heirs, *which expressly gave him a contingent fee*, had been virtually expunged by annexing the trust for sale to the primary indefinite devise of the freehold, for the purpose of expanding that *implied* estate into the fee-simple.

Lord Talbot, therefore, did but adhere to those strict but firmly settled and useful rules; a deviation from which brought down upon that great lawyer, Lord Mansfield, from Mr. Fearne himself, the most pointed sarcasm, clothed, however, in truths which all have hailed, who prefer the certainty of definite rules to the precariousness of unlimited discretion, even in the wisest and most upright judges.

Mr. Fearne considered the argument for vesting an estate in the trustees *rendered stronger by the limitation to the survivor;* but this view of the case is extremely singular; since nothing was better known, or more strongly established, even in Lord Talbot's time, than that *a trust for sale may give a fee by implication:* and therefore his lordship's opinion must have proceeded from his reading the trust for sale *as referring to the contingent fee of the survivor,* and consequently as not affecting the antecedent limitations.

But, says Mr. Fearne, the effect of the devise to the survivor is included in that of the devise to the trustees and their heirs, inasmuch as it expressly directs the fee to the same person as such a complete limitation would ultimately carry it to; it, therefore, does not contradict the construction of a joint fee; it is merely deficient in expression by stopping short of the intended extent, as in the case of a devise without any words of limitation, but not so fully as that does. And why, he continues, is not the less deficiency to be supplied by construction on the nature of the trust in one case, as well as the greater in the other.

But surely that construction is dangerously latitudinary, which, in order to draw a particular inference, begins with expunging from the instrument an express limitation; and then, having obtained the desired conclusion, resumes and recognises that express limitation, and affirms it to be nugatory, because implied and involved in the legal operation, which, if it may be so expressed, had been acquired in its absence.

This part of Mr. Fearne's argument, therefore, it is respectfully submitted, is also fallacious; and the sophism seems to consist in his assuming, that the limitation of the freehold may be regarded, for a moment, abstractedly from the limitation of the inheritance, and attract the trust for sale, and be consequently expanded into the fee, which instantaneously involves and merges the contingent interest in the survivor: whereas no rules of law are founded on a firmer basis than those which command the construction to be made upon the *whole instrument, ex visceribus testamenti* (*a*); and to reject nothing which can have a legal and consistent operation. (*b*)

What, then, remains? only an argument *ab inconvenienti*, deduced from the virtual frustration of the testator's intention, by the inability of the trustees to make a present title to a purchaser. But Lord Talbot's decision leaves no room for this argument; for while his lordship affirmed, that the inheritance did not vest in the trustees, he shewed in what manner a conveyance might be effected, even without the concurrence of the heir.

But while the writer takes the liberty of expressing these reflections on the case of *Vick* v. *Edwards*, it is incumbent on him to observe, 1st. That Lord Talbot's idea of the fee being in abeyance, upon the principles above explained (*c*), is erroneous; as is the conclusion his lordship draws from it, that the heir's joining in the conveyance

(*a*) 3 Burr. 1541.
(*b*) 2 P. Wms. 282.
(*c*) Vide supra, 175—178.

would have no other effect than that of supplying the want of proving the will: for as the fee was *not* in abeyance, but resulted to the heir of the testator, a conveyance from him would have passed it until the death of one of the trustees. 2dly. That the general practice of the profession, and the MS. case cited by Mr. Fearne (*a*), militate with the authority of Lord Talbot, though supportable, it is apprehended, by the strongest arguments; and under devises similar to that which has been discussed, it is generally deemed safe to take a title from the trustees alone with a lease and release. (*b*)

But a contingent remainder or executory interest in copyholds cannot be surrendered (*c*); and, perhaps, there are no means of binding it by estoppel but an act of parliament.

But it is observable, that though at law a possibility (that is, any contingent or executory interest,) is not assignable, yet it is so in equity for a valuable consideration. (*d*) Hence, therefore, when a contingent remainder, or other executory interest, is derived from an equitable ownership, it is as entirely and completely transferable, as a portion of the trust which answers to a legal estate; but when such executory limitation confers a legal right, of course a conveyance, recognised only in equity, can have no other effect than to convert the executory limitee into a trustee for

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(*a*) *Goodtitle* v. *Layman*.

(*b*) Co. Litt. 191 a. n. 1. After sec. 301. 17th edition.

(*c*) *Doe* dem. *Dormer* v. *Wilson*, 4 Barn. & Ald. 303.

(*d*) *Per* Lord Hardwicke, 2 Atk. 616.

the vendee, when the event happens upon which the interest of the former vests.

And *any* possibility (except a power simply collateral) (*a*) may at law be released to one who has a freehold in deed or at law. (*b*)

Secondly, with reference to the transfer of contingent remainders by the act of law.

It may be laid down, that contingent remainders, executory devises, and future uses, when descendible, are governed by the same rules and principles as vested remainders; and the test of their transmissibility by devise, the ascertainment of the person (*c*), is equally the test of their transmissibility by descent. And, indeed, it has been long a convertible proposition, that an interest which is devisable, is descendible. (*d*)

One peculiarity, however, is deducible from the incapacity of these executory interests for being conveyed, *viz.* that an ownership tantamount to a seisin, so as to make a *possessio fratris*, cannot be acquired in these, as in a vested remainder. (*e*) But each heir for the time being is so far the owner that he may devise or release. (*f*)

(*a*) 15 H. 7. fol. 11. b. 1 Rep. 111. 174. Mo. 605.

(*b*) Litt. 447. Co. Litt. 266 b. 265 b. The author uses the word possibility in the same sense as in the foregoing paragraph.

(*c*) Supra, 223.

(*d*) 1 Bl. Rep. 605.

(*e*) Vide supra, 129.

(*f*) 2 Prest. Abs. 443.

APPENDIX.

On reperusing p. 213., the Author fears he may be misapprehended, and will therefore add here, that though Lord Hardwicke in *Hooker* v. *Hooker*, note (*c*), held in opposition to *Cordal*'s case, Cro. Eliz. 315. that dower *might attach* on a remainder in fee, disjoined from the immediate freehold by an intervening *contingent* interest, he seems to have *clearly admitted* that it must be *defeated* by the *vesting* of such interest.

A conditional limitation having been illustrated Chap. I. Sect. VI., the case put p. 217., for an *incidental* purpose, was intended to give only its *effect*. The reader will, therefore, understand the clause following the limitation of A's estate, to be expressed, in the *grant*, by a *conditional proviso*, according to the doctrine in p. 51. 57, 58.

In p. 60. n. (23) the interest of C is a *remainder* in the two *latter* cases (see p. 51. 159.), a *shifting use* in the *former* (see p. 27.)

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THE END.

ERRATA.

Page 4. 8th line from the top, *for* "assurances" *read* "assurance."
11. 11th line from the bottom, *for* "through" *read* "though."
13. 12th line from the bottom, *for* "determnaition" *read* "determination."
19. side note, *after* "moment," *read* "in."
27. n. (4), *for* "is" *read* "are."
42. n. (14), place the comma after "see"; and *for* "Sect. 6." *read* "Sect. 5."
58. 11th line from the top, put note of interrogation after "inheritance."
76. 1st line from the top, *for* "limitations" *read* "limitation."
103. 1st line from the top, put a comma after "apprehended."
110. n. (b), *for* "76. n. (e)" *read* "49. n. 20."
113. 3d, 4th, & 5th lines from the bottom, *for* "matters" *read* "matter."
146. n. (c) *for* "Sect. 4." *read* "p. 214."
150. 5th line from the bottom, omit "erroneousness of the."
188. 5th line from the bottom, *for* "estates" *read* "estate."

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